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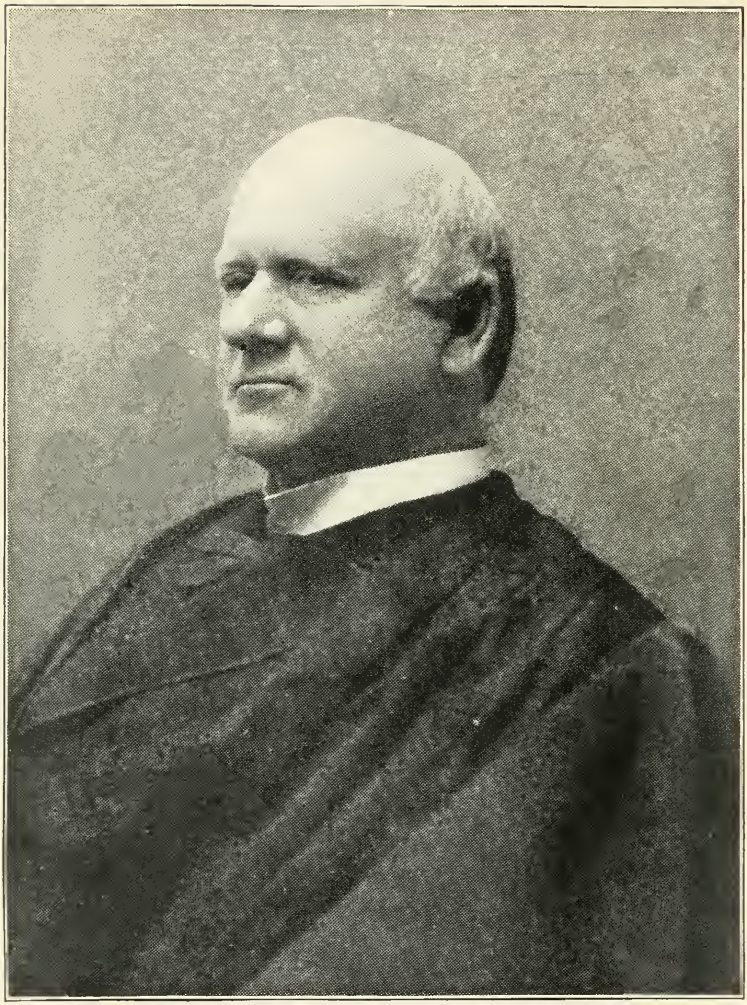

J. M. HARLAN

CYCLOPEDIA OF LAW

A Treatise on Criminal Law and Criminal Procedure

INCLUDING

CRIMINAL EVIDENCE AND CRIMINAL PLEADING; ALSO A TREATISE ON THE LAW OF EVIDENCE

VOL. XI

EDITOR IN CHIEF

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Assisted By

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PREFACE.

The subject of Criminal Law as presented herein is simply that of the ordinary text-book, abbreviated somewhat on account of the limited space in which to treat so important a subject. While in many instances the student will be impressed with the wisdom of the law, and the subtleness of the safeguards devised to protect the accused from being punished when guiltless, and the careful classification and definition of crimes to prevent oppression; yet it is clear that there are many offenses to-day going unpunished which future legislatures and courts will have to recognize and punish as serious crimes.

It is a common saying, with more than a grain of truth therein, that he who steals ten dollars will likely go to prison, while he who steals a million will go to Congress. Perhaps there is more adroitness in the theft of the larger sum, but the common sense of mankind—the true source of all law in the abstract—must soon recognize that the latter offense is as much a crime against society as the former. The smaller sum may be obtained by the petty thief by stealth or by force with the design of satisfying his pressing

necessities, while the larger is obtained by a carefully laid trap from which the numerous victims can no more escape than a sparrow from the talons of a hawk. Industrial combines, corners, mergers, watered-stocks, as surely rob the people as the Jesse James of the highway.

Society cannot go on punishing the small criminal and overlooking the large and successful one. The fate of Rome, Carthage, and all the corrupt civilizations of the past, which crumbled away, giving place to ruder but more just ones, must be ours unless the law-observing and industrially sane portion of our citizens unite to demand punishment for those who are filching by quasi-criminal methods the productions of the masses.

C. E. C.

Conneaut, Ohio, April 28, 1906.

CRIMINAL LAW AND CRIMINAL PROCEDURE --- EVIDENCE AND PLEADING.

CHAPTER I.

THE SUBJECT OUTLINED, DEFINED AND DISTINGUISHED.

Sec. 1678.* OUTLINE OF THE SUBJECTS TO BE TREATED.—The subject of Criminal Law, which includes that of Criminal Procedure, may be divided into three parts, or divisions, for convenience of treatment, as follows: 1. General Principles, applicable to crimes. 2. Specific crimes, common law and statutory. 3. Criminal Procedure and Evidence.

The first of these parts, *general principles applicable to crimes,* may be again subdivided as follows: 1. Crimes defined and distinguished. 2. Conditions of criminality. 3. Tests of crime. 4. Classification of crimes.

In the present chapter we will be concerned with the definition and distinction of a crime from other civil wrongs, and citing the leading writers on the subject of criminal law.

*This book is No. 11 of The Cyclopedia of Law, the former 1677 sections comprise the first ten books of the series.

Sec. 1679. DEFINITION OF A CRIME.—A crime is an act injurious to the public, and forbidden by law under pain of punishment.*

The prominent idea of a crime is that it is an offence against the public, and is punishable by the state or public in its own name. This was, perhaps, not the theory in the infancy of the law, but it is the essential element of crime now. There is nothing in the nature of a crime which *per se* determines that a particular

*"A crime is an act forbidden by law under penalty of punishment." Fitz James Stevens.

"A crime, or misdemeanor, is an act committed or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors; which, properly speaking, are mere synonymous terms; though in common usage, the word 'crimes' is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of 'misdemeanors.'"—4 Bl. Com. 5.

"A crime, as opposed to a civil injury, is the violation of a right, considered in reference to the evil tendency of such violation, as regards the community at large."—4 Steph. Com. 4.

"Crimes are those wrongs which the government notices as injurious to the public, and punishes in what is called a criminal proceeding, in its own name."—1 Bish. C. Law, Sec. 43.

"Crime, in the provision of the United States Constitution (Art. 4 Sec. 2) for the extradition of persons charged with treason, felony or other crime, is synonymous with 'misdemeanor,' and includes every offence below felony, punishable by indictment, as an offence against the public."—Matter of Clark, 9 Wend. 212.

Crime comprehends misdemeanors. Every misdemeanor is a crime, though not one of the gravest character.—Van Meter v. People, 60 Ill. 168.

wrongful act shall be designated as a crime, as not every crime involves moral turpitude, and whether or not the doing or not doing of a particular act shall constitute a crime, and be punishable as such, depends solely upon the will of the law-making power.

Sec. 1680. A CRIME SHOULD BE DISTINGUISHED FROM A TORT.—A crime is to be distinguished from a tort, as a crime is a public wrong, a tort simply an injury to an individual for which the remedy given is a civil action for damages. While it is true that almost every crime is accompanied by a wrong to the individual, that is, a private wrong as distinguished from a public one, yet this is not always the case, as in treason or sedition, the offense is entirely against the public.

And at the common law the crime of murder was entirely public, and not any offence against the individual as the civil wrong was merged in the crime, and died with the individual, so that there was no civil injury for which an action of damages could be brought. But the common law has been changed in this regard by statutes in the various states giving the representative of a deceased person or his heirs a civil action for damages against the person by whose crime or wrongful act the deceased met death.*

*"The distinction between a crime and a tort or civil injury is, that the former is a breach and violation of the public right and of duties due to the whole community considered as such, and in its social and aggregate capacity; whereas the latter is an infringement or privation of the civil rights of individuals merely."—Brown.

Sec. 1681. A PROSECUTION FOR A CRIME AND A CIVIL SUIT FOR DAMAGES FOR THE WRONGFUL ACT MAY BE CARRIED ON AT THE SAME TIME.—As a general rule, a prosecution for a crime may be carried on at the same time with a civil action for damages for the injury resulting from the offence. Thus, in the crime of larceny, the offender may be punished for the crime and then sued civilly to collect the money or property stolen. But in England, and in many of the states, if the crime committed amounts to a felony, it is not permissible to sue civilly for the wrong done, until the crime has first been dealt with.* While in the case of misdemeanors, as an assault and battery, you can bring the civil action while the criminal prosecution is pending, But the rule is not uniform, and the English rule is repudiated in some states, and in other states the civil action may be brought simultaneously with the criminal one, but must be stayed until the criminal suit has been tried.**

*1 Bish. C. L. Sec. 267; 1 Hale, Pleas of the Crown, 372; 2 East, 409.

**16 Mich. 108; 6 N. H. 454. The theory being, that it is the public wrong or injury that must be redressed first, and that it is the duty of the party injured to assist the public in inflicting the prescribed punishment before he undertakes to get indemnity for the individual wrong done him. Another reason for the rule that the crime should be punished before the civil action is brought, is to be found in the early theory of the common law that crimes were avenged by the person wronged, following the biblical doctrine of "an eye for an eye, and a tooth for a tooth." The relatives of the injured per-

Sec. 1682. CRIME IS USUALLY FOUNDED UPON AN OVERT ACT.—One of the distinguishing elements in deciding whether a crime exists or not, is the presence or absence of what is called an "overt act." By this is simply meant that the law does not, perhaps because it could not, punish a criminal frame of mind. There must be some open, palpable, *overt* act which goes to show the crime. Hence a man may be mentally desirous of committing crime, and have wicked designs in his heart, but until he commits some overt act he is not punishable; and when the crime has been committed, it is the *act* and not the criminal frame of mind that is punished. And it is claimed to be a principle of natural justice that the "intent" and the "act" must both concur to constitute a crime. Thus, the simple possession of counterfeit coin, or a forged instrument with intent to pass it, is no crime at common law, but if they have been procured with that intent, there is an *overt act,* and the crime is complete.*

Sec. 1683. THE OVERT ACT AND CRIMINAL INTENT MUST CONCUR IN POINT OF TIME TO CONSTITUTE A CRIME.—There is no

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son were called upon to pursue and punish the wrongdoer, the crime being regarded as against the individual and his family, rather than against the public as now, it fell to the injured party or his friends and relatives to first punish the criminal and then recover for the civil injury.

*7 Term, 514; 16 Eng. L. & Eq. 480. But state statutes have changed the common law in this regard by declaring that it shall be a crime to have counterfeit coin or a forged instrument in possession with intent, etc.

crime unless the overt act and criminal intent concur in point of time. Thus, if a man finds a pocketbook, but has no intention of stealing it, and after he has had it a day or two, he forms the intention to convert it to his own use, and does so, this is not larceny, since the criminal intent and the overt act did not concur in point of time.*

Sec. 1684. AN ATTEMPT TO COMMIT A CRIME MAY BE PUNISHED AS A CRIME.—A crime may be either a complete offence, or simply an attempt to commit a crime, which attempt may be punished as criminal.

A criminal attempt is defined to be an act done in part execution of a crime.** This attempt must be such an act as is proximately connected with the final illegal object. That is, not every overt act which may lead up to the commission of a crime is to be regarded as a criminal attempt; and preparation for a crime must be distinguished from a criminal attempt, since a good deal of preparation might be made and yet no crime result. Thus, buying matches to set fire to a building was not an attempt to commit arson, but was only preparation for it, and not punishable. So purchasing a gun with which to commit a crime is not an attempt to commit the crime, but only a preparation. While many fine distinctions have been drawn between preparation and the attempt to commit a crime, from

*14 Johns. 294.
**May's Crim. L. Sec. 28.

which may be gleaned that if the act in preparation to commit a crime is not in itself wrongful, then it is not a criminal attempt. But where the act is not in itself indifferent, but constitutes a wrong in itself, even though only in the way of preparation, it constitutes a criminal attempt. Thus, the procuring of dies for the purpose of counterfeiting may be punished as an attempt to commit a crime.*

As a general rule, attempts to commit a thing impossible are not punishable. Thus a boy under fourteen years of age is deemed in the eye of the law unable to commit rape, and therefore cannot be guilty of an attempt to commit rape.

Under the American rule an attempt may be criminal, even though the criminal purpose could not be accomplished under the circumstances. Thus, if a man puts his hand into another's pocket with intent to take his pocket-book, he is guilty of a criminal attempt to commit larceny, though it turns out that there was no pocket-book there and the theft would have been impossible.** The English rule is to the contrary.***

An attempt to commit a crime was an offence at the common law, but such an attempt is seldom punishable in any of the states unless the statute expressly provides for the punishment of such attempt.

*35 Ala. 380; Bennett & Hurd's Leading Cases, 8.
**5 Cush. 365; 9 Allen, 274.
***1 Bish. C. L. 745.

Sec. 1685. SOLICITATION TO COMMIT A CRIME MAY BE A CRIMINAL ATTEMPT.—Solicitation to commit a crime is a criminal attempt even though the solicitation is refused, in the following cases: 1. Where the crime involves a breach of the public peace. 2. Or interferes with public justice, as soliciting one to commit a perjury.*

But as to other crimes than those involving a breach of the peace or an interference with the administering of justice, solicitation is not a criminal attempt.**

Sec. 1686. THERE ARE NO CRIMES EXCEPT THOSE DECLARED TO BE SUCH BY LAW.—It is always to be borne in mind that *crimes must be declared by law.* That is, there is no single principle by which to distinguish crimes from civil injuries, nor anything in the nature of a wrongful act to make it a crime unless it has come to be regarded as such by the common law, and the common law is still in vogue, or a state or federal statute has declared it to be a crime. Without this sanction, an act, however wrongful, is not to be considered a crime.

The theory is, that the state makes its selection of what are crimes, and anything that it has failed to designate as a crime is not a crime. The courts can

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*1 Wharton's Crim. L. 179.

**27 Pick. 476; 82 Ill. 191. An attempt is some act, which if the principal crime had been committed, would have been a necessary and important part of the crime resulting.

punish only those offences which have been declared to be such by law.

In a number of states, as Indiana, Ohio, and Iowa, there are no common law offences. That is, while the common law has been adopted, and the various crimes and the principles applicable thereto are largely the same as at common law, they now derive their sanction not from the common law, but from the statute or criminal code of the state, which has undertaken to define all offences against the state that are to be regarded as crimes.*

There is no criminal jurisprudence of the United States, that is, there is no unwritten criminal law, like the common law of England, by which crimes are punished throughout the nation. The United States court can punish as criminal only those acts which are pronounced as criminal and for which punishment has been provided by act of Congress. It has been said that the United States has no common law, but this is a little too broad. It is agreed, however, that the United States courts have no common law jurisdiction. And while they have theoretically no common law, or

*The offences or crimes defined in the statutes of the States are simply declaratory of the common law crimes. They recite them, as a rule, with no serious variation, so that it is safe to discuss the common law crimes, and knowing what constitutes the crime at common law, look up the State statute and see if the elements of the offence have been varied. In other States a principle is sometimes appealed to, that any act which was criminal at the common law, and for which no punishment has been provided by the State statutes, is regarded as a misdemeanor, and punishable as such.

unwritten law governing them, yet they will be so far governed by the general principles of English and American jurisprudence founded upon the common law as to make their decisions independent, in certain cases, of the rules governing state courts.

Sec. 1687. AUTHORITIES ON CRIMINAL LAW.—Prior to Blackstone's time there were four great writers upon the subject of crimes. One of them was Bracton, another was Coke, another Hale, and another Hawkins. Bracton's work is of little value in practice now, though frequently quoted by Blackstone. Coke's Institutes are still in use. Hale's "Pleas of the Crown," and Hawkins' "Pleas of the Crown" are both valuable works in tracing the development of criminal law.

Since the time of Blackstone there has been another valuable book on the English law of crimes, known as "Russell on Crimes," which is in use both in England and America.

Among the American authors on the subject are Bishop, Wharton, Lawson, Underhill and MacLean.

The latest statutes and decisions thereon are to be found noted in the second edition of the American & English Encyclopedia of Law and the Lawyers' Reports Annotated.

CHAPTER. II.

OF THE LEADING CONDITIONS OF CRIMINALITY.

Sec. 1688. THE CONDITIONS OF CRIMINALITY GENERALLY.—What is meant by *conditions of criminality* is, that conceding that something has been done which is contrary to law, and for which the state has fixed a penalty, there are certain conditions which must exist to make such act a crime, and bring it within the category of offences which the state will punish. These leading conditions of criminality may be stated as follows:—

1. The accused must have been of competent age.
2. He must have acted voluntarily.
3. He must have possessed sufficient mental capacity.
4. He must have acted with criminal intent.

While some particular crime may involve other conditions, which will be discussed when such crimes are considered in a later chapter, the present general conditions of criminality must exist in all cases where the act is to constitute a crime for which the person performing the act is to be held responsible. We will now discuss these conditions in their order.

Sec. 1689. INFANCY AS A DEFENSE TO A CRIMINAL CHARGE.—The rules which have come to prevail in this regard may be stated to be:—

1. That a child under seven years of age is conclusively presumed to be incapable of committing a crime. He may commit a tort, and his property be answerable for such tort, but he cannot be punished criminally, since he has not capacity to commit a crime. This presumption of the infant's incapacity to commit crime, is what is called in law an *indisputable conclusion.* It not being permisssible to show that the particular child in question is precocious and therefore punishable. So a child under seven years of age cannot convict himself on his own confession.*

2. Between the ages of seven and fourteen a child is *presumptively* incapable of committing crime. That is, while the presumption is that he is *incapable,* yet evidence may be admitted to show that the nature of the act was understood by him, and that he is therefore *capable.* The burden is on the state to establish the fact of capacity in such cases.

3. After fourteen years of age, capacity is presumed, and cannot be disputed on the ground of infancy.

There are crimes which an infant under a certain age is conclusively presumed to be incapable of committing by reason of the nature of the crime, rather than by reason of his age. Thus, at the common law, a female under the age of ten years was incapable of giving consent to sexual intercourse; and this age has been raised by statute in the various states. So a male

*Hale's Pleas of the Crown, 27.

under fourteen years is held to be incapable of committing rape, but in a few courts this presumption is allowed to be rebutted by showing that the person has arrived at the age of puberty.*

Sec. 1690. OF COMPULSION AS A DEFENCE.—While it is a rule of law that to constitute an act a crime, it must have been a voluntary one; yet, *compulsion* is generally no defence. That is, it is no defence to the commission of a crime, to show that it was committed in obedience to the command of another, as a superior. Thus, though a parent command a child to commit a crime, it is no defence to the child for so doing; or a master commanding a servant will be no excuse to the servant for committing a crime. But the effect these circumstances, where they appear in a given case, may be given by the jury in extending clemency to the accused, cannot be definitely stated.

Pressing necessity is sometimes relied upon as amounting to legal compulsion, as where one is required to take the life of another to save his own, as in self-defence. As a general rule, pressing necessity does not amount to legal compulsion. Pressing necessity, however strong, is no defence to a criminal charge, where the party wronged is in no sense responsible for the existing conditions leading up to the act.**

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*14 Ohio, 222.

**The Dudley Case, 15 Cox Crim. Cases, 624; 1 L. Q. Rev. 51. In the Dudley case, the jurists discussed whether in a case where two men were cast away at sea with only one plank to support them, and the stronger of the two should

The leading example of compulsion arises out of the relation of husband and wife. In many crimes, at common law, the wife is exempt from punishment by reason of the presumed coercion of the husband. She being considered as under the domination of his will. This was true as regards crimes committed by the wife in the husband's presence, but not as to all crimes. The fact that it is committed in his absence, though by his orders, does not amount to compulsion. He must be present so as to make his personal influence and will felt. So this presumption as to the husband's influence is not a conclusive one, and may be rebutted by evidence of the facts and circumstances showing that the wife was really the prime mover, and the husband was the one under compulsion.*

It is not absolutely necessary to constitute such compulsion of the wife that the husband should be in

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push the other off and take the plank, and the weaker one should be drowned, the other would be guilty of murder. In the Dudley case, two of three shipwrecked seamen, killed the third and drank his blood under the belief that if they did not do so all would be famished anyway. The court decided that they were guilty of murder, and that their situation however pressing, was no defence, as the man whom they killed was not in any sense responsible for their condition. The convicted men were afterwards pardoned.

But it is held not to be treason for one to join the ranks of rebels to save his life, and continue with them so long as the restraint continues. 1 Russell on Crimes, 660, 661.

*55 Conn. 397; 38 Mich. 744. In Arkansas, it is held that there is no presumption of coercion of the wife in any case, but that it must be shown. This holding is not followed in other States. 27 Ark. 423.

sight; it is sufficient if he is near enough for the wife to be under his immediate influence and control.*

As to the degree of crimes affected by this presumption of coercion, the authorities are not quite agreed. At the common law, if the wife was guilty of treason, murder or robbery, in common with or by coercion of her husband, she could be punished as a feme sole. In other words, the presumption of coercion does not apply to such high grade offences. There is some doubt as to the presumption applying to robbery; and, as a rule, the presumption only applies to the lesser felonies and misdemeanors.**

The sale of intoxicating liquors in violation of law, by the wife, with a defence of coercion on the part of the husband, is of frequent occurrence. The Massachusetts court in such a case said, that slight circumstances would rebut the presumption of coercion and render the wife guilty. The reason for this is that the temptation to gain from such illegal sales will often make the wife the chief actor in the matter. Where the facts indicate that she is personally to blame, she will be treated as a feme sole and dealt with accordingly.***

The various Married Women's Acts do not affect the question of presumption of coercion of the wife

*112 Mass. 287.

**1 Bishop on Married Women, Sec. 42. In the higher offences it is said that no presumption of coercion exists by reason of the husband's presence, but actual coercion by him may be shown.

***132 Mass. 267.

by the husband as upheld at common law; they pertain to the wife's contracts and property, so that unless you can find state statutes or decisions to the contrary, the common law rules prevail.

Sec. 1691. OF INSANITY AS A DEFENCE.—Another of the conditions of criminality is the possession of sufficient mental capacity. This leads to a discussion of insanity as a defence for the commission of a criminal act.

While there are various forms of insanity, and these are defined and explained, it is well to bear in mind that *insanity* is not a term of the law at all. It is a popular term, and used as a matter of convenience. It involves mental derangement, but consists of various types of mental derangement, and not all of these is a good defence to a criminal charge.

The defence of mental incapacity may arise from: 1. Insanity. 2. Drunkenness.

Insanity may be either: 1. Total; or, 2. Partial.

Total insanity involves *idiocy, lunacy* and *madness.*

An *idiot* is a fool or madman from his nativity, and never had any lucid intervals. He is never criminally responsible.* Idiocy involves something more than mere weakness of mind, and includes utter absence of reason. Thus it is said by Hale, "He knows not how to count twenty shillings, or tell his own age, nor father nor mother, but if he knows his letters and can read by the instruction of another, then he is no idiot."

*1 Russell on Crimes, 36.

A *lunatic* is one afflicted with dementia only at certain periods, having intervals of reason. That is, he is sane at times, and at times insane. During his frenzy, a lunatic is irresponsible for crimes; at other times he is just as responsible as a sane person.

Permanent dementia or *madness* is that condition of the mind which excludes reason. It is a permanent loss of mind through disease or accident. Such a person cannot commit a crime. His acts, of whatever character, are not chargeable to him on account of his mental derangement.

Sec. 1692. SAME SUBJECT—PARTIAL INSANITY.—The difficult questions presented to the courts for decision where insanity is offered as a defence, involves the question of *partial insanity*. Which is a qualified derangement of mind, or partial derangement, not including a total lack of intelligence or responsibility. It often appears before the courts in such form as to raise the question of criminal responsibility, which is not the case where the accused is totally insane.

Among the more prominent forms of partial insanity may be mentioned:—

1. *Monomania,* by which is meant mania on some one thing, while the person so affected is perfectly rational upon every other subject. It involves an uncontrollable impulse to commit crime. Sometimes it is said that uncontrollable impulse is a defence, but as a rule it is not a good defence unless it results from a dis-

eased mind. Every man is bound to control himself, as otherwise it would be impossible to punish crimes, which nearly always involve the question of feeling and impulse. But in case the accused is a monomaniac, or afflicted with monomania, that is, a disposition to commit a partcular crime or offence, which is the result of a diseased brain, the courts will allow it as a defence. The law will not recognize an irresistible impulse unless it is an insane impulse, and the product of a diseased mind.*

And the mere yielding to an insane impulse to commit crime, even though it be called insane, if it might have been resisted, is criminal.**

2. *Kleptomania,* which is a species of monomania, is a recognized form of insanity of the type of monomania. It means a monomania to steal. And where it is proven to exist is a good defence to the criminal charge of larceny.***

The monomania must have been the result of mental disorder or it is no excuse for crime. Thus, it is no defence to show the existence of monomania on one subject, and a crime committed on another. So that the crime which is sought to be excused must have

*46 Ia. 88; 50 N. H. 369.

**May's Crim. Law, 15.

***2 Parker's Crim. Cases, 43. In this case the defendant had the insane desire to steal shoes from a particular person. The monomania appeared in that the accused would steal nothing else or from any other person. The defendant was acquitted by the jury as a sufferer from kleptomania, and irresponsible for her acts as resulting from a diseased mind.

been the result of the mental affliction from which the accused was suffering at the time.

It has been said that when insanity is offered as a defence, whether monomania or other forms of insanity, if you can find a motive for the crime, the chances are that the person's insanity plea is a fraud. If the person acts as a sane person with wicked intentions would act under the circumstances, it is reasonably clear that he ought to be held responsible for his acts.

3. An *insane delusion* is a real and firm belief in the existence of a fact which is wholly imaginary. An insane delusion is occasionally offered as a defence to a criminal charge, as, that the accused, while he committed the offence, was acting under an insane delusion, or in the belief of imaginary facts that did not exist.*

The historical examples of delusion, or moral insanity, as a defence to crime are found in the Hadfield case, the McNaughton case, and the Guiteau case. Being three celebrated cases in which the defence of delusion, emotional or moral insanity, or irresistible impulse was relied upon to excuse the crime charged.**

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*7 Met. 500; 1 Bennett & Hurd's Cases, 95; 2 Lawson's Defences, 158.

**Hadfield's Case, 27 How. St. Trials, 1307; the McNaughton Case, 10 Cl. & Fl. 200; the Guiteau Case, 10 Fed. Rep. 161.

The Hadfield case is celebrated because the accused was defended by Lord Erskine, who made one of the ablest arguments ever made in the English courts on the subject of criminal capacity. The facts in the case were, that the defendant went into a theater, and when the king, Geo. III, came in he shot at him with a revolver, but did not kill him. Shooting at the king was treason under the English law. It

A delusion to be a good defence to crime, must be something more than an erroneous conclusion from disputable facts. Insane delusion is never the result of reason and reflection. This was why in the Guiteau case, the defence was not good, as the accused had simply come to an erroneous conclusion as to the necessity of his act, by reason of brooding over facts more or less colored by his delusion.

So irrational opinion regarding questions of law, politics, or religion are not to be classed as insane delusions.*

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was shown in the defence that the accused was a gentleman, and rational upon most subjects, but irrational upon one subject. His delusion being that he was deputed to save the world, and the only way he could do so was to die, and the only proper way to die was by encompassing the death of the king, after which he was sure he would die and save the world. Upon these facts the accused was acquitted.

The McNaughton case will be referred to in a later section.

Guiteau was tried and convicted for shooting and killing President Garfield, his defence was based on the fact that at the time of the commission of the crime he was possessed of the delusion or idea that the only way to bring about harmony in the Republican party was to kill President Garfield. The court in passing upon the question of this delusion or homicidal mania as a defence limits it to cases where it is shown that the reason of the accused is dethroned as to the act charged, and it was not sufficient in the Guiteau case to constitute a good defence.

*98 U. S. 145. In this case the defence to a charge of polygamy was the firm religious belief that polygamy was a divine institution on the part of the accused. The court held that a delusion as to politics or religion, in an otherwise sane man, is no excuse for crime, unless the delusion is the result

Irresistible impulse is another form of insanity sometimes relied upon as a defence to crime. Thus where the accused through extremely aggravating circumstances is compelled to commit an unlawful act, it is frequently set up as a defence that the crime resulted from irresistible impulse. But such an excuse is not a valid one, as it is the duty of every person to resist such an impulse.

The irresistible impulse to be a good excuse for the commission of crime, must be that of a person otherwise insane. An alleged irresistible impulse resulting from a passionate propensity, anger, excitement or jealousy, though it for the time being overcomes one's judgment, is no defence to a criminal charge.

Another form of partial insanity that is frequently before the courts is what is called *moral insanity.* Moral insanity is a derangement of the moral faculties, while the intellectual faculties remain unimpaired. It is frequently offered as a defence to crime, and sometimes successfully. It is a disability of the will power to refrain from what is known to be wrong and punishable. It has been insisted by medical men that one may be sane in mind but morally irresponsible, but this is not admitted by the courts and jurists, so that moral insanity, as a rule, is no defence to crime, being considered little more than moral depravity.*

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of disease instead of false reasoning, or the delusion is of such a character that if the imagined facts existed it would be justifiable. See also, 7 Met. 506.

*41 Ia. 232; 63 Ala. 207; 12 Crim. L. Mag. 6; Guiteau's

Another form of partial insanity relied upon in some cases, is called *emotional insanity,* which is a temporary mental disturbance arising from violent excitement of the emotions and passions. Unless the emotion comes from a diseased brain, and is the result of mental disorder, it is no excuse for crime. An unaffected and intelligent brain cannot offer emotion as an excuse for crime.*

Sec. 1693. SAME SUBJECT—TESTS OF CRIMINAL RESPONSIBILITY.—The tests of criminal responsibility, as regards mental capacity, are not the same now as they were at common law. By such a test is meant what shall govern the jury in deciding the question whether or not the accused shall be held criminally responsible for his act.

1. In the early history of criminal jurisprudence the test applied was what is known as the "wild beast" test, by which, unless the accused was shown to be totally deprived of his understanding and memory, and incapable of understanding his actions any more than

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Case, 10 Fed. Rep. 161. See also, the North Am. Rev. for Jan., 1882.

Some cases hold that so-called moral insanity may be taken in consideration by the jury in fixing the degree of the crime. 213 Conn. 514. But the weight of the authority is that moral insanity is not to be recognized as a defence or excuse for the commission of crime, and that if the intellect of the accused is good, he is liable for his act, however morally depraved he may be. Reg. v. Dixon, 11 Cox., C. C. 341; 115 Cal. 255, Humphreys v. State, 45 Ga. 190; 21 N. J. L. 207; 7 Alb. L. J. 273.

*38 Mich. 482.

an infant, a brute or wild beast, he was not exempt from punishment.*

2. The right and wrong test in general. Another test developed at the common law was based upon the power of the person charged with crime to distinguish right from wrong in the abstract. This was the second test applied by the English courts, and prevailed until the McNaughton case was decided, when the previous tests gave place to another test therein stated.**

3. The right and wrong test with reference to a particular act, was the power to distinguish right from wrong with reference to the act at the time it was committed. The former test had been to distinguish right from wrong in the abstract, the new test was, that if the person was unable to distinguish right from wrong in the particular act complained of, then he was not to be held criminally responsible, recognizing the theory of monomania.

4. The fourth test is known as the *power of control* test. It has been said that the true test of criminal responsibility lies in the word "power" as used in a criminal case; that is, the *power* to distinguish right from wrong; the *power* to adhere to the right and eschew the wrong. Hence the *power of control* test, or the question of responsibility resting upon the fact as

*16 State Trials, 176.

**McNaughton Case, 10 Cl. & Fin. 200. There was another English test which was not recognized in this country, called Lord Holt's test. Under this the test of responsibility was that the accused, if alleged to be an imbecile, must have had the ability and capacity of children under fourteen years of age.

to whether or not the person had the mental *power* to resist the commission of the act.*

The power of control test, as laid down in the leading case (Parson's Case, 81 Ala. 577), does not seem to be in line with the weight of authority in this country. The weight of authority seems to favor the right and wrong test with reference to the particular act; so that if the person can distinguish right from wrong with reference to the particular act, then he must have the power to choose the right, and is criminally responsible if he does not.

With reference to criminal responsibility, where the defence of insanity is interposed, it may be said:—

1. Insanity, when relied upon as a defence to a criminal charge, is a mixed question of law and fact. It is so mixed that the court will not be permitted to say, after having heard all the evidence, that the accused is sane or insane. The jury cannot pass upon the subject of sanity until the court has given it the propositions of law by which they are to be governed in passing upon the facts.

2. Insanity is a perfect defence to an accusation of crime if the accused, at the time he committed the act, was afflicted with a mental disease to such an extent as to render him incapable of distinguishing between right and wrong.

3. Where it appears on the trial that whatever the defendant did was the result of a disordered brain and

*Parson's Case, 81 Ala. 577.

diseased mind, he will not be held criminally responsible for his act. The fact that the accused is able to determine between right and wrong in the abstract, or generally, will not prevent the accused from showing their incapacity as regards the particular act in question.

4. No form of moral or emotional insanity is a good defence against a criminal charge.

Sec. 1694. INTOXICATION OR DRUNKENNESS AS A DEFENCE.—As a general rule, voluntary intoxication, though producing even temporary madness, is not to be regarded as an excuse for a criminal act.* And it was held in some cases, that drunkenness was not only a defence to a criminal charge, but was in aggravation of it.**

The general reason for refusing to allow the defence of drunkenness as a complete excuse for crimes committed while in such a condition, is, that public insobriety or drunkenness is in itself an unlawful act, and it is not in accordance with justice to allow one illegal act to excuse another. The two wrongful acts taken together make the offence complete. That is, one will not be allowed to say that he intended the wrongful act, but did not intend its results.

But while the general rule is that drunkenness is not a defence to crime, yet the rule is subject to exceptions, and there are many cases where intoxication of

*18 N. Y. 9; 17 Mich. 9.
**38 Ill. 515.

the accused at the time of committing the crime may be an important factor in determining the grade of the offence committed. Thus:—

Drunkenness may reduce the crime of murder from the first to the second degree, because in most states, murder in the first degree involves a wilful and premeditated killing. So that if a man is so intoxicated that he is incapable of premeditation, it reduces the crime of murder in the first degree to murder in the second degree.*

But drunkenness cannot of itself reduce the crime of murder to manslaughter. It may be received, however, in evidence, as bearing upon the subject of provocation.**

Where the gist of the crime is the existence of a specific intent, drunkenness may be a complete *defence.* Thus:—

Since the crime of burglary involves the breaking and entering of the dwelling house of another in the night time, with the intent to commit a felony therein, if the accused was so intoxicated that he could not entertain the intent of committing a felony, it would be nothing more than a trespass, and not burglary. So intoxication may be a complete defence to larceny, if it negatives the intent to steal. And likewise it may be a

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*101 U. S. 631; 40 Conn. 136. Contra, 37 Mo. 332; 50 Vt. 483.

**9 Humph. (Tenn.) 663; 18 N. Y. 9. Contra, 3 Gray (Mass.) 463. And it is said that intoxication will not make an inadequate provocation adequate. 44 Pa. St. 55.

defence to the crime of "assault with intent to kill", since the intent is here the gist of the crime, and without it the crime may only constitute "assault and battery."* It is also a good defence to the charge of attempt to commit rape, but not to the charge of rape. It is also a good defence to a charge of passing counterfeit money; and perhaps to the offence of having voted twice at an election.**

As a general rule, evidence of intoxication at the time of the commission of the act may be admitted in evidence for the purpose of explaining his conduct, his utterances, and giving effect to the incriminating facts. So evidence of the accused being intoxicated is a part of the *res gestae,* or facts surrounding the act.***

Voluntary intoxication produced through mistake or the fraud of another may be a complete defence to a crime. As where a person has been made intoxicated and procured to commit crime, the condition of mind of the accused may be such as to constitute a complete defence.****

An organic mental disease, such as delirium, is a defence to a criminal charge. And, in cases where intoxication, or habitual drunkenness, has resulted in delirium, and while in such a mental condition the accused has committed a crime, he is not criminally responsible. The delirium is presumed to be the proxi-

*19 Mich. 401; 47 Mich. 334.
**29 Cal. 678; contra, 21 Minn. 22.
***2 P. & C. 817.
****1 Hale, Pleas of the Crown, 32.

mate cause, and the intoxication the remote cause, so that the mental incompetency may be set up as an excuse for the offence.*

Sec. 1695. OF CRIMINAL INTENT.—The fourth condition of criminality is the criminal intent of the accused. It may be stated as a fundamental and general principle that to constitute a crime there must be a criminal frame of mind.** The criminal intent may be either *general* or *particular.*

As to general criminal intent, it is a rule that it must be present to constitute a crime. But the general intent to produce the result is presumed from the commission of a completed offence.

General malevolence in some cases amounts to a criminal intent. It may be no more than carelessness or negligence, and yet be criminal. Thus, one may be convicted of manslaughter who makes reckless use of firearms and thereby causes the death of some person. And such malevolence or recklessness takes the place of specific criminal intent.*** But there are certain crimes at common law which call for a specific or *particular* intent. And in such cases, the existence of the specific intent is the very gist of the offence or crime, and no other intent, however wicked, will supply its place.****

Mistake or ignorance of the law is no excuse for

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*61 Ind. 455; 50 Ala. 149.
**97 Mass. 567; 49 N. Y. 137.
***2 C. & K. 230.
****19 Mich. 401; 49 Mich. 330; 33 Mich. 300.

committing crime. The maxim that "ignorance of the law excuses no man" is fundamental, and applies to the law of crimes as well as the law of civil wrongs. So that, however earnestly one might believe a statute unconstitutional, or desire to refrain from the commission of a crime, ignorance or mistake would be no excuse.* So advice of counsel that a statute about to be violated is unconstitutional or inapplicable, will not excuse the defendant for violating the law. Any other holding would be subversive of law and order.**

A mistake of fact producing untrue conclusions as to one's legal rights, may deprive an act of criminality. Thus a person cannot be convicted of larceny where he takes the goods of another under a bona fide claim of right, even though it turn out that he had no right to them.***

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*98 U. S. 145; 103 U. S. 304.

**11 Blatchford (U. S.) 200; 57 Barbour, 625. In the last case the violation of the statute as regards voting by Susan B. Anthony was considered.

***3 Car. & P. 309; 36 Mich. 306; 23 Q. B. D. 168. In the last case, decided in 1829, the defendant was before the court on a charge of bigamy. By statute at that time in England, after seven years absence of a husband without knowledge as to where he was, it was not bigamy for the wife to remarry without obtaining a divorce. In the case it appeared that the husband of the accused was missing and it was reported that he had been lost at sea. His widow remained single for six years and six months and then remarried under the firm belief that her former husband was dead. Shortly afterwards, the former husband turned up and had her prosecuted for bigamy. Nine of the fourteen judges held that there was no crime committed.

But under exactly similar facts, the Massachusetts courts

So a minor cannot be convicted of unlawful voting, where he voted under an honest belief that he was of the required age.* And one who wrongfully signs another's name to a note, believing that he has authority to do so when he has not, is not guilty of forgery.**

Upon general principles it is held that there cannot be a crime committed without a criminal mind or intent. And this general principle dates from the very origin of criminal law. The principle needs some explanation, and in some cases qualification.

Thus, where the crime is statutory, ignorance or mistake of fact is often no defence. As the legislature may make an act criminal irrespective of the intent or motive.***

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have decided that there was a crime committed. 7 Met. 472; 11 Allen, 23. The Massachusetts holding has been criticised by Mr. Bishop in his work. 1 Bishop, Crim. Law, Sec. 303n.

*52 Ala. 308.

**7 C. & P. 224.

***People v. Fox, 39 Mich. 200; 52 Mich. 579. In People v Fox, the accused was charged with selling intoxicating liquors to a minor, under a statute making such an act criminal. The defence was that the seller had reason to believe the purchaser to be of full age. The lower court held that this was not a valid defence. The supreme court, by Judge Campbell, said, that the lower court was wrong in so holding, that it was not to be assumed that the legislature intended to punish as criminal an act which involved no criminal intent. There being no crime where there is no criminal mind. And as to such offenses the law remains the same.

But the principle was overruled by Judge Cooley, in 52 Mich. 579. So that a man may be held liable for adultery committed with a woman whom he did not know to be married.

So where the statute of the State made it illegal to kill

These holdings that a man may be punished though he acted under ignorance of fact, are based simply on the police power of the state. But where the offence is one of the higher crimes, ignorance of fact is generally a good defence, but not where the offence is one of a minor nature and involving the police or sanitary regulations of the state.*

Sec. 1696. SAME SUBJECT—WHEN IGNORANCE OR MISTAKE OF FACT WILL BE A GOOD DEFENCE.—Ignorance on the subject, or mistake of fact, is a good defence to a criminal charge in the following cases:—

1. When from the law it appears that the evil intent is the essential ingredient, then ignorance of fact necessary to that intent is a defence.

2. When a statute makes an act indictable irrespective of guilty knowledge, then ignorance of fact is no defence. But such offences and the punishment therefore are usually of the minor order, since while a man should be punished for his indiscretion, he ought not to be sent to state's prison for an act not involving guilty knowledge.

3. The question whether absence of criminal intent is to constitute an excuse or not is a legislative

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and sell a veal calf less than four weeks old for food, it was not a valid defence that the defendant was ignorant of the fact of the age of the calf. 97 Mass. 567. The statute was mandatory, the court held, and the accused acted at his peril, being bound to know the facts and keep within the statute, and that good faith was no excuse. See, also, 12 Vroom, 552.

*48 Ind. 289; 55 Ala. 16.

question. This results from the fact that some offences are punishable by the legislature, though they do not involve moral turpitude, and in their discretion, the legislators may make such offences punishable without criminal intent.

4. When a statute inflicts a punishment for knowingly committing an act, then guilty knowledge is an essential ingredient of the crime. This is a characteristic of all higher crimes, and is only absent in the smaller offences involving the police or sanitary regulations, for which mistake of fact nullifying criminal intent is no excuse.

Sec. 1697. SAME SUBJECT—IF TWO INTENTS ARE INVOLVED BOTH MUST EXIST TO CONSTITUTE THE CRIME.—Some crimes, by reason of their nature, involve two or more intents, in such cases both intents must exist or the crime is not punishable. Thus in larceny, there must be an intent to trespass, and an intent to steal, and both of these must be present to constitute the particular crime of larceny. Hence if an article is taken from another on the belief that it belongs to the party taking it, the trespass is complete but not the intent to steal, and it is therefore not larceny.

But where this double intent exists to commit a particular offence, it is immaterial which is the principal and which the subordinate intent. As where the accused gave poison with intent to seduce, he was indict-

able on a charge of giving poison with intent to injure.*

Sec. 1698. SAME SUBJECT—WHEN UNINTENDED RESULTS FOLLOWING THE COMMISSION OF AN UNLAWFUL ACT ARE PUNISHABLE.—The commission of an unlawful act is frequently followed by an unintended result. The question then arises as to what extent the person is to be held criminally responsible for a result he did not intend? In answer to this, it may be stated as a general principle, that if a person means one wrong and does another, he is punishable for the wrong done.**

Where one intends to commit a crime, but by accident or mistake an unintended result follows, he must bear the consequences. It is not what he intended, but the consequences of what he did. Thus, if A shoots at B, intending to kill him, and missing B hits and kills C, he is nevertheless guilty of murder in killing C.***

But the result must be something commensurate with the intent. So that where a person shot at a chicken belonging to his neighbor, and by mistake shot and killed his neighbor, he ought not to be held guilty of murder, as the result is not commensurate with the intent, and is not in the nature of the wrongful act intended. But in an early English case, involving such facts, the accused was found guilty of murder.****

*8 Mich. 15.
**1 Bishop, Crim. Law. 327.
***33 Eng. Law & Eq. 567.
****1 East, Pleas of the Crown, 265.

The fact that the result is greater than was anticipated, or in excess of the intent, will not relieve the wrongdoer from criminal responsibility for his illegal act.*

The act intended need not be criminal, but it must be *malum in se,* and not a mere *malum prohibitum.* That is, for an act which is not a crime in its nature, the party will not be held responsible for unintended results arising therefrom.**

It is held that this principle of a man being responsible for unintended results following his wrong-doing, does not apply to crimes the essence of which involves the existence of a particular intent. As in such cases no other intent can be substituted.***

A wrongdoer is responsible criminally for the natural consequences of his acts, but not for the possible consequences.****

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*3 Mich. 10.

**1 Bish. Crim. Law, 331. Thus, if while hunting in violation of the game laws, a man supposedly shoots at a deer, and kills one of his companions, he is not to be held guilty of murder or manslaughter; since, while it was illegal for him to be hunting, it is only a *malum prohibitum,* and does not involve the violator in consequences not intended.

***59 Ala. 1. Thus if a spring-gun is set by a person, and results in the death of some one; it would not show an intent to murder. To the contrary, see 69 Me. 163, where a person was held guilty of intent to murder one person, when he had fired into a crowd with intent to kill another. In some cases the accused is held responsible for the results of such an act on the ground that he intended to kill any one whom he might hit in the crowd.

****39 Mich. 503. In this case a man had knocked another

One is not criminally liable for an accidental injury, nor is he liable in an action of tort. In criminal law, when the result is shown to have arisen through an accident, no crime is predicated of such accident.*

Injury that is received through the negligence of another is not to be classed with accidental injury. Here the negligence may be the cause of the injury and it is not purely an accident.

Sec. 1699. OF MALICE AS AN ESSENTIAL CONDITION TO CRIME.—When malice is a preliminary condition to the existence of crime it must be shown to have existed. But there may be criminal intent without malice. Thus manslaughter is a wrongful taking of the life of another without malice. Many offences are punished only when coupled with malice, and then it must be shown to exist. Malice is not easily defined; or easily applied when defined.

Malice is defined to be that state of mind which prompts one to the commission of an unlawful act, without lawful justification.**

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down in the street, and while he was lying there a wagon came around the corner at a rapid pace and ran over the man and killed him. The death being the result of the injuries received from the horse and wagon rather than from the assault, and the Supreme Court held that the accused was not guilty of manslaughter, as it was not the *natural* consequences of his act that the man was killed, but only a chance or *possible* consequence. See also, 7 Ill. 541; 7 Allen, 541.

*1 Bennet & Hurd's Cases, 50; Kelyng's Report, 40; Robertson Case, 2 Lee (Tenn.) 239.

**15 Pick. 337; 71 Mich. 267. Malice signifies a wrongful act done intentionally without just cause or excuse. 4 B. & C. 247; 30 Tex. App. 203; 12 Fla. 117.

In the abstract malice is said to be a wicked intent to do injury. But there must be something more than the intent, or no crime exists which can be punished. There must be a violation of law prompted by malice.* Malice does not necessarily involve a wicked frame of mind against the person injured. It is a mental state resulting in an act producing injury to another. Thus though poison has been set for A, and is accidentally taken by B, there is malice as against B.**

Sec. 1700. SAME SUBJECT—MALICE IS OF TWO KINDS, EXPRESS MALICE AND IMPLIED MALICE.—Malice, in the law, is of two kinds. 1. Express malice. 2. Implied malice. There is also a statutory malice, or malice aforethought, which may be regarded as a third kind of malice.

1. Express malice is such as is expressed by words or conduct, indicating an intention to commit a crime.

2. Implied malice is such as the law presumes from the intentional commission of an unlawful act, as where one kills another, it is not necessary to show any express malice, as the law will imply from the doing of the unlawful act, such malice as will constitute the crime.

3. Malice aforethought is a wicked purpose or resolve. It is a common statutory and criminal ingre-

*64 Mich. 265.

**24 N. J. Law, 410. Where an act is committed in reckless disregard of the rights of another, that act is malicious, though involving no ill-feeling against the person actually injured.

dient which distinguishes murder from manslaughter. Thus in a charge of murder, the state must show not only malice, but what in law is called *malice aforethought.*

Malice includes those motives which are more wicked, but it does not include them all. Thus, there may be anger, hatred or revenge without legal malice.* The absence of malice in a criminal act may affect the degree of the offence, that is, it may change the charge of murder to manslaughter, or may negative the existence of a crime, as in the case where the offence charged is *malicious mischief.***

Sec. 1701. OF PARTIES TO CRIME IN GENERAL.—There may be more than one person engaged in the commission of a crime or unlawful act, and under this head will be discussed the relation which such parties bear to each other, and how they are classified in law. Also the distinction between *natural* and *artificial* persons, as made by the criminal law.

Sec. 1702. SAME SUBJECT—THE PARTY ACCUSED OF CRIME MUST BE A NATURAL PERSON.—In criminal law a natural person is to be distinguished from an artificial person, or entity, such as a corporation, since the latter cannot technically be held guilty of a criminal intent. Corporations may be proceeded against by criminal procedure, and have their franchises taken away from them, or be compelled

*35 Mich. 16.
**64 Mich. 265.

to abate a nuisance, but the entity, or artificial being, cannot be punished as a criminal. The punishment of crimes must be inflicted upon natural persons capable of criminal intent, as the members or officers of the corporation.*

Sec. 1703. SAME SUBJECT—THE LEADING PARTIES TO CRIMES ARE EITHER PRINCIPALS OR ACCESSORIES.—The leading parties to crimes are either *principals* or *accessories.*

A principal is one who is actually or constructively present at the time it is committed, and aids in its execution.**

Principals are classified as principals of the *first* and *second degree.* Though this distinction is now nearly lost sight of, and principals are regarded as being of the first degree, if principals at all. The distinction is preserved to illustrate the theory of the common law, and to aid in its being properly understood.

A principal in the first degree is he who is the actor and perpetrator of the deed. To be such a principal, it is not necessary that the party be physically present at the commission of the crime. He may lay poison, or set a trap for another, or he may send poison to another through an innocent agent, and yet be a principal in the first degree.

In distinguishing between principals in the first and second degree, a regard must be paid as to whether or

*Bishop, Crim. Law, 417. (8th ed.)
**10 Johns. 85.

not the crime was committed through a guilty agent or an innocent one. If the crime is committed through an innocent agent, though the party is not present who instigated the act, he is a principal in the first degree. While if the crime is committed through a guilty agent, and the party responsible for the agent's act is not present, he is neither a principal in the first or second degree, but is called *an accessory before the fact.**

A principal in the second degree is one who is present, aiding and abetting in the commission of the deed. Thus if a man were standing by, or watching to give the alarm, while another was committing a crime, he would be a principal in the second degree.**

The test to determine whether one is a principal or accessory is whether he is so near as to render his help, if necessary, available. If he is not near enough to render his help available, he may be an accessory, but he is not a principal either in the first or second degree.***

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*5 Parker's Crim. Cases, 120; 2 C. & K. 379.

**47 Ind. 568. The principal in the first degree includes the actor. A principal in the second degree is he who is near enough to render assistance, if assistance was needed. But the distinction is not of great importance, as the statutes usually mete the same punishment to each.

***26 Ind. 495. One man may detain the owner of property, while another steals it, he is principal in the second degree and the one who steals the property is principal in the first degree. Where a man goes to another's house and takes him out riding, so that an accomplice may go in and steal property, they are guilty, as principal in the first and second degree. 10 Ohio St. 145; 10 Pick. 477.

Sec. 1704. SAME SUBJECT—ACCESSORIES ARE EITHER ACCESSORIES BEFORE THE FACT OR ACCESSORIES AFTER THE FACT.—Accessories are those who are not present actually or constructively at the time the crime is committed, but who are concerned in the crime before or after the fact. The distinction between principals and accessories is important chiefly in procedure.

An accessory before the fact is one whose will contributes to the felony committed. His will must contribute actively to the felony committed by another. He must be too far away to render assistance, or he becomes a principal in the second degree.*

There are some offences that do not admit of accessories. Thus there can be no accessories before the fact to the crime of high treason. As all participating are regarded as principals, and this is the rule at common law. So at the common law it is said there are no accessories before the fact to the crime of manslaughter.**

In misdemeanors all engaged in the commission of the offence are principals. There being no accessories

*1 Bishop, Crim. Law. Sec. 673. The distinction between a principal and an accessory before the fact is said to be purely technical, and not based on reason. Since, in theory, what one does by another, he himself does. Aside from the rules of pleading, they are frequently punished to the same extent as a principal.

**40 Eng. L. & Eq. 556.

in such small offences. Accessories being treated the same as principals in the lighter offences.*

So petit larceny, though sometimes punished as a felony, and a felony at common law, does not admit of accessories before the fact; because of the smallness of the offence they are regarded as principals.**

An accessory is criminally responsible for all the probable consequences of the act committed.***

An *accessory after the fact* is one who, knowing a felony has been committed, aids the felon in his effort to escape punishment.

It is essential that the accessory after the fact should have notice that the person whom he assists has committed a felony, and the felony must have been fully completed. Also that the assistance should be given one to prevent the *apprehension, trial* or *punishment* of the felon. If it is to assist along either of these three lines, the person so assisting the felon will be guilty as an accessory after the fact.

A neglect to prosecute a felon, or simply suffering his escape, does not make one an accessory after the fact. There must be some personal assistance rendered

*12 Ohio St. 214.

**3 Hill, (N. Y.) 395. The theory of the law being, that in the highest grade of crimes like treason, if one is guilty at all he is guilty as a principal, and in the lesser crimes, if he is guilty at all, he is also to be punished as a principal. But in the intermediate felonies, as a rule, the distinction is maintained between accessories and principals in the first and second degree.

***40 Mass. 77; 26 Mich. 112; 96 Ill. 73.

the felon, as by concealing or furnishing him with the means of escape. Simple indifference, or neglect to prosecute or pursue, does not render one an accessory after the fact.

Compounding a felony is not such an act as to render one an accessory to the felon. Though this may form a substantive and independent offence. The reason being that the assistance rendered is not personal.

In rendering assistance the accessory may commit a substantive offense. The ordinary assistance enabling him to avoid apprehension, arrest or conviction, makes him an accessory after the fact, but one may go so far in becoming an accessory after the fact as to commit a substantive crime, for which he may be punished irrespective of whether the original person was guilty of the felony or not.

A receiver of stolen goods was not, at the common law, an accessory after the fact, unless he rendered some personal assistance to the thief. He might be guilty of receiving stolen goods, knowing them to have been stolen, but that would not make him an accessory after the fact, unless he did something to enable the felon to avoid apprehension, trial or punishment.*

Where one aids a felon by effecting his rescue or escape, he commits a substantive offense. He becomes an accessory after the fact also, but in so doing, he in addition commits a substantive crime for which he may be punished; so that the prosecutor may sometimes

*42 Ga. 221; 40 Cal. 599.

elect whether he will punish such a person as an accessory after the fact, or for the offence of jail delivery.*

There are no accessories after the fact in treason, for the same reason as there are no accessories before the fact, all persons becoming connected in such a manner with the crime of treason are punished as principals. There being no classification or distinction made as regards that high crime. There are no accessories after the fact in misdemeanors, for the opposite reason, that the law makes no distinction on account of the smallness of the offence, punishing all as principals.

A wife cannot become an accessory after the fact to her husband as principal. It is her duty to protect him. Either may be an accessory before the fact to the other as principal. And it is said that the husband may be an accessory after the fact to his wife as principal.

Sec. 1705. SAME SUBJECT—ACCOMPLICES. —*Accomplice* is a general term involving all those who have any legal status with reference to the crime committed. It includes principals in the first degree, principals in the second degree, and accessories before and after the fact. No one is ever punished as an accomplice in a criminal charge unless he can be brought under one of the well defined terms to which we have referred. An accomplice includes any one criminally connected with the charge preferred.**

*1 Bishop, Crim. Law, Sec. 697.

**39 N. J. Law, 598; 116 Mass. 345.

Sec. 1706. THE TRIAL OF ACCESSORIES AT COMMON LAW COULD NOT BE BEFORE THAT OF THE PRINCIPAL.—At the common law an accessory before or after the fact could be tried with his principal or after his principal, but not before. This was to obviate the predicament of convicting the accessory, and acquitting the principal, which might happen if the accessory was tried first. The distinction between accessories before the fact and principals is abolished in many of the states, the accessories being held equally liable with the principals. Under such statutes the accessory may be tried before the principal, but a subsequent acquittal of the principal will usually entitle the accessory to his discharge.*

Where the statute makes the offence of "aiding and abetting" a substantive crime, the acquittal of the principal cannot affect the guilt or innocence of the accessory.**

At the common law, if by reason of death or escape the principal was not sentenced, no sentence could be passed upon the accessory. This was on the theory that the death of the principal purged the offence, and having thus purged the principal offence, the secondary one fell with it. This doctrine has been changed by statute.***

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*44 Ind. 214.

**Goins v. State, 46 Ohio St. 457. Thus one may be tried for aiding and abetting murder, where the principal was only convicted of manslaughter.

***1 Bishop, Crim. Law, 668.

Sec. 1707. PRINCIPAL AND AGENT AS PARTIES TO CRIMES.—The principal is responsible for what his agent does by his authority, but he only is criminally punished, who does the act, or permits it to be done.*

A servant while engaged in the business of his master is presumptively acting under his direction, so that the master may be sometimes held. As a rule, the master is civilly liable for the acts of his agent or servant in the law of torts. But a man cannot be punished criminally for the acts of his servant while the servant is acting in the scope of his employment. It may be shown by the master when charged criminally that the act was committed without his authority.**

The fact that one is a servant and acts by the authority of another, is no defense. Both the principal and the servant may be guilty, and the conviction of one is no bar to the prosecution of the other. Hence, where a man commits a crime through the agency of his servant, both he and the servant are criminally responsible.***

Sec. 1708. CLASSIFICATION OF CRIMES ACCORDING TO THE GRADE OF THE OF-

*Raym. 580. 12 Whart. 472.

**4 Gray, 16; 14 Gray, 14. When a saloonkeeper is charged with violating the closing laws, it is generally no defence for him to allege that it was done by his clerk.

So if a person residing in one State employs another to obtain goods under false pretenses in another State, he may be convicted in the latter State if found there.

***11 Metc. 66.

FENSE.—At the common law crimes are classified according to the grade of the offence, into *treason, felony* and *misdemeanor.*

At the common law, treason was not distinctively defined. Parliament from time to time enumerated acts to be known as treason, and made such acts punishable by death. Specifically it is the crime of a subject or citizen who attempts to injure the sovereign or overthrow the government.

Treason against the United States is defined in the Constitution, to which definition nothing can be added or taken away. By this treason consists only in levying war against the United States, adhering to its enemies, giving them aid and comfort.

In England Parliament can make anything treason that it sees fit, but not so in the United States, as the Constitution defines what shall constitute treason.

A *felony,* at the common law, was such a crime as was punished by forfeuture of the felon's estate, and usually, but not always, by death.* In this country we have no forfeiture of estates as a punishment for crime.

By statute in many of the United States it is provided that all offenses that are punishable by death or imprisonment in the state prison are felonies, and offenses not so punishable are misdemeanors.** Where no statute exists on the subject, it is generally

*4 Bl. Com. 94; 1 Russ. on Crimes, 78; 99 N. Y. 216; 114 U. S. 423.

**20 Cal. 117; 58 Ga. 200; 47 Ohio St. 481; 35 Wis. 308; 38 W. Va. 58.

conceded, that offences punishable by jail sentence only are misdemeanors, and if punished by imprisonment in the state prison it is a felony.*

The term *misdemeanor* includes all indictable offenses which are not classed as felonies.**

Sec. 1709. CLASSIFICATION OF CRIMES ACCORDING TO NATURE OF THE OFFENCE. —In the various state codes, offences are usually classified according to the nature of the rights or subject-matters affected by the criminal act. Thus we have:

1. Offences against sovereignty.
2. Offences against the person.
3. Offences against property.
4. Offences against public justice.
5. Offences against public peace.
6. Offences against morals and religion.

The idea of such a classification is to cover the field of crime, and bring offences under the same heading, for convenience of treatment. Each of these groups will be taken up in their order in the succeeding chapter, and the offences included therein specifically considered.

*156 U. S. 468; 17 R. I. 698.
**4 Bl. Com. 5; 3 Tex. App. 114.

CHAPTER III.

OF SPECIFIC CRIMES.

Sec. 1710. I. OFFENCES AGAINST SOVEREIGNTY.—Under offences against sovereignty we shall consider *treason, misprision of treason,* and *sedition.*

Treason. This is the highest crime known to law. It involves a criminal renunciation of allegiance to the sovereign power, and is quite a difficult offence to accurately define.

At the common law treason was divided into *high treason,* and *petit treason.* Petit treason was a breach of private domestic faith, as in case a wife should kill her husband. This form of treason no longer exists in England, and never prevailed in this country. High treason, or treason against the state or sovereign, is the only form of treason known to the present law.

Blackstone enumerates seven different forms of treason, only two of which are of present importance. Resulting from our dual form of government, and the division of sovereignty between the states and the national government, treason may be committed either against the state, or against the United States. The state constitutions usually define treason in the language of the United States constitution, and cases

involving treason have seldom come before the courts. The assassination of the chief executive has heretofore not involved the crime of treason, and the criminal has been prosecuted for murder.

Under the constitution of the United States, treason is defined as: 1. Levying war against the United States; 2. Adhering to the enemies of the nation, giving them aid and comfort. This provision of the constitution was borrowed from England, and is to be found in almost the same language in the statute of 25 Edw. III., defining treason.

Our constitutional provision further requires that there must be two witnesses to the same overt act. The cases involving the crime of treason are not very numerous in this country, among which were the Dallas cases growing out of the resistance to the collection of the liquor tax in 1794. Resisting the Embargo Act, and simply conspiring to levy war are not held to be treason under this definition.*

Conspiracy to levy war or subvert the government is not treason, since some overt act must be undertaken and accomplished within the meaning of the constitution. That is, there must be an actual assemblage of men for the purpose of executing a criminal design, or the levying of war. A treasonable

*Hoxey Case, 1 Paine 265; Bowman Case, 4 Cranch, 65; Burr's Case, Causes Celebres, Vol. I, II. Nor is resistance to the Fugitive Slave Act considered as treason. 2 Wallace, 200.

design is not sufficient, there must be an overt act in execution of the intent.

The distinction between a treasonable and riotous assemblage of men lies in the intent with which they come together. If the object to be accomplished is of a public nature and looks to the overthrow of the government, there is treason. But armed resistance to law for some private end, is not treason.

The second form of treason is that of adhering to the enemies of the United States, giving them aid and comfort. By this is meant actual assistance, so that mere talk or words would not constitute the crime.* The enemies here meant must be foreign enemies, and not merely rebel subjects.**

But where war has been levied by rebel subjects, one who adheres to them may be convicted of treason under the clause of *levying war.*

It is not treason against a state to commit treason against the United States; the state constitutions provide as to what shall constitute treason against the state.***

In some of the states of the Union, treason having been committed, it is made a crime for one knowing of the offence to conceal it, or fail to disclose it to the government, such offence being known as *misprision of treason.* In this respect treason differs

*2 Bishop, Crim. Law, 1233.

**2 Abbott (U. S. Rep.), 364. Contra, May's Crim. Law, 212-213.

***11 Johns. (N. Y.) 549.

from other crimes, as felonies, as it is not a crime to fail to disclose the fact that a felony has been committed.

Sedition. At the common law, sedition was the unlawful disturbance of the tranquillity of the state by insurrectionary movements, not amounting to treason. Thus, anything said with intent to spread disaffection among the king's subjects and excite hostile action, was called sedition, and punished as a serious offence. In the early days of our government an act known as the Alien and Sedition Laws was passed, which would have allowed the punishment of those who criticised the officers of the government, but it was repealed as inconsistent with our form of government, and the freedom of speech.* So that, until Congress shall see fit to pass some law defining sedition and making such acts punishable, we have nothing that corresponds to the common law offence of sedition.

Sec. 1711. II. OFFENCES AGAINST THE PERSON—HOMICIDE.—The first and highest offence against the person, is *homicide*. By which is meant the taking the life of a human being, whether lawful or unlawful.**

There are three kinds of homicide, or man-killing:

*Acts of Congress of July 6 and July 14, 1798; Whart. St. Trials, 22; Lalor's Cyclopedia of Political Science, "Alien and Sedition Laws."

**Burns v. People, 1 Park. Cr. 182, 186.

1. Felonious homicide. 2. Excusable homicide. 3. Justifiable homicide.*

Sec. 1712. FELONIOUS HOMICIDE.—Felonious homicide is the unlawful killing of a human being, and includes murder, manslaughter and suicide.

There are several fundamental propositions which apply to all kinds of felonious homicide.

1. The first of these propositions is, that assuming all the conditions of criminality already considered as existing, there must next be clear proof of the *corpus delicti;* or body of the crime. This consists of the overt act committed through criminal agencies, and the establishment of which includes the distinct proof of the death of a person, as by the finding of the body of the deceased. That is, there can be no conviction until the substance of the crime is distinctly proven.**

*Justifiable homicide includes those cases in which the killing is performed in the performance of a duty, as where a sheriff executes a criminal, or a policeman kills a person who resists capture, or a private person takes life in self-defence.

Excusable homicide embraces cases of killing in which the party cannot justify the act by virtue of a duty or right, but is excused by the law from any punishment, in view of his innocence of any criminal intent. Thus death caused by accident, or through ignorance, and the like.

Homicide is also of various kinds according to the relations of the parties: as regicide, the killing of the king; parricide or matricide, the killing of one's parent; fratricide or sororocide, the killing of a brother or sister; foeticide, the killing of an unborn child; infanticide, the killing of a child after birth; suicide, the killing of one's self.

**2 Hale, Pleas of the Crown, 290; 18 N. Y. 179; 5 Mo. 526; 43 Ia. 519.

2. Another fundamental fact in the establishment of the crime of felonious homicide is that there must be the killing of a person in being. The killing of a child quickened with life in the mother's womb, before birth, is not felonious homicide. The child must be free from its mother or its wrongful death cannot be felonious homicide.*

3. Another essential to felonious homicide is, that the death must take place within a year and a day after the injury is inflicted. So that if a person is mortally wounded but does not die until a year and a month afterwards, it is not felonious homicide.**

4. Again, the injury must be the cause of the death, or the *causa causati,* that is, the cause of the cause. But under this essential, it is no defense to the charge of felonious homicide that the deceased did not take proper care of himself after receiving the injury.*** Or, that he refused to submit to a surgical operation that might have saved his life.**** Or that the immediate cause of death was the unskilfulness of a physician.***** But where the wound is not mortal, and the unskilfulness of the physician is the immediate cause of death, this is good defense, according to some cases.******

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*Clark's Crim. Cases, 196.

**6 Cal. 637. Where it was held that a statute increasing the penalty for such an injury passed after the act was committed did not apply.

***44 Conn. 537.

****2 Mead & Ryan, 351.

*****39 Mich. 236; 28 Ark. 155; Clark's Crim. Cases, 202.

******2 Bush (Ky.), 495; 2 Allen, 136; 21 Ala. 300.

One is guilty of felonious homicide if, with criminal intent, he inflicts a serious wound which, concurring with other causes, produces death. But if a person inflicts a mortal wound and before the injured person dies another kills him outright, the first assailant is not guilty of felonious homicide.*

Sec. 1713. SAME SUBJECT—MURDER.—Murder is not easily defined, and is governed largely by the statutes in each state. Even at the common law it was not easily defined. The statutes governing murder to-day, are a distinct growth, and the elements of the crime are more elaborate than at common law. The early idea of murder was a secret killing; the present idea is killing with malice aforethought. So that murder may be defined as the unlawful killing of a human being with malice aforethought.**

Malice aforethought involves premeditation. Circumstances indicating a design or preparation are evidence of it, but the term itself includes premeditation.

There need be no direct evidence of malice aforethought. It may be implied from the circumstances under which the crime was committed. But the homicide is not presumed to have been malicious. That is, the burden of proof rests upon the state to show not

*5 Jones (N. C.), 420.
**5 Cush. 295.

only that the homicide was committed by the defendant, but also that it was maliciously committed.*

Malice aforethought does not require any considerable lapse of time between the intent and the act.**

Sec. 1714. SAME SUBJECT—DEGREES OF MURDER.—At the common law there were no degrees in the crime of murder. Every kind of felonious homicide was either murder or manslaughter. But now, by statute, in the various states, murder is distinguished as of the first or second degree, and in some states there is also a murder in the third degree.

A Pennsylvania statute first classified murder into first and second degree murder. The purpose of the classification was to distinguish between the more heinous and deliberate murders for which capital punishment is inflicted, and those not involving premeditation for which a lighter punishment seemed more just. Murder, as thus distinguished into first and second or third degree murder is defined by the statutes of each state, which must be consulted to be accurate.

Sec. 1715. MURDER IN THE FIRST AND SECOND DEGREE DISTINGUISHED.—Murder in the first degree is that form of felonious homicide perpetrated by means of poison or lying in wait, or by any other kind of wilful, deliberate or premeditated

*53 N. Y. 164. Contra, 9 Metc. 93.
**5 Curtis, 295.

act, or committed in the perpetration, or the attempt to perpetrate any arson, rape, robbery or burglary.

All other kinds of murder are usually classified as murder in the second degree.

Murder in the first degree is of two kinds: 1. Where it is premeditated. 2. Where it is committed in the perpetration or attempt to perpetrate another felony of high degree, which felonies are usually enumerated in the statute classifying murder.

The punishment for murder in the first degree, in those states which have not abolished capital punishment, is death, either by hanging or electrocution, whereas the punishment for murder in the second degree only involves imprisonment, either for life or a definite term of years. Where capital punishment is abolished, the punishment in each case is imprisonment, in the first degree for life, and in the second degree for a term of years to be fixed by the court.

A specific intent to take life is not necessary to constitute murder in the first degree, where the killing results from the attempt to commit the specified felonies. But in deliberate and premeditated murder, the intent to take life is essential.*

While it is not necessary that an indictment for murder should charge the degree, it is necessary that the jury find and state the degree of the murder in

*8 Wright (Pa.), 55; 66 Ind. 428; 2 Bishop, Crim. Law, Sec. 728n. But the deliberation and premeditation need not be for any appreciable space of time.

its verdict, that the court may know what sentence to pronounce upon the guilty person.*

Sec. 1715A. SAME SUBJECT—SPECIFIED CASES OF MURDER.—Duelling. Duelling is one of the specific cases of murder. In its legal signification, duelling, is a prearranged fight, with deadly weapons, between two persons to settle some antecedent controversy. It is not necessary that either should intend to kill the other. If one of the parties is killed, all persons participating or encouraging the act are guilty as principals of murder in the first degree. This includes physicians and attendants. But the law in this regard has not been strictly enforced.** A challenge to a duel is an indictable misdemeanor at the common law, on account of its tendency to incite a breach of the peace.*** So a challenge in one state to fight a duel in another state is indictable in the state where the challenge is delivered, as it constitutes a breach of the peace.****

Suicide. Suicide is another form of felonious homicide. At the common law it was a felony and was punished by forfeiture of the suicide's goods, and his body was given an ignominious burial, unless he was insane when he killed himself, in which case no punishment followed. And in nearly all cases the jury found that the suicide was insane, so as to pro-

*39 Mich. 549; 3 Ohio St. 39.
**24 Grat. (Va.) 642.
***6 East, 464.
****12 Ala. 276.

tect his family. One advising another to commit suicide, which is committed in his presence, is guilty as a principal of murder.* But if he is not present he could not be convicted, as he would be an accessory before the fact, triable only after the principal, and the principal, for obvious reasons, could not be tried.** Attempts to commit suicide are made punishable by statute.

Sec. 1716. SAME SUBJECT—MANSLAUGHTER.—Every unlawful killing of a human being is either murder or manslaughter. They are distinguishable by the ingredient of malice. Manslaughter being unlawful homicide without malice.

Manslaughter, by statute, is also divided into degrees, but these are not of great importance to the consideration of the subject.

At the common law manslaughter was of two kinds. 1. Voluntary. 2. Involuntary.

1. Voluntary manslaughter involves an intent to kill, but under such circumstances as repel the presumption of malice. As where life is taken in an affray or under great excitement.***

2. Involuntary manslaughter arises where death is caused by an unlawful act; but without any intent to kill.

Whether a felonious homicide is murder or manslaughter depends upon the attendant circumstances,

*105 Mass. 162.
**9 C. & P. 79.
***48 Cal. 436.

which show or repel the presumption of malice, or the presence or absence of intent to kill.

Sec. 1717. SAME SUBJECT—MITIGATING CIRCUMSTANCES IN FELONIOUS HOMICIDE WHICH MAY REDUCE THE CRIME FROM MURDER TO MANSLAUGHTER.—Among the mitigating circumstances which will show that the offence is to be classed as manslaughter rather than murder, may be mentioned the following:

1. An adequate provocation reduces the crime from murder to manslaughter.* The provocation does not excuse the crime, it simply mitigates it.

2. Death resulting from a mutual affray is manslaughter, and not murder. Thus the killing of another in a prize fight is manslaughter.**

3. The provocation must be adequate, and mere insulting words are not alone sufficient, nor are threats sufficient. Blows are held to be a sufficient provocation.***

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*35 Mich. 16.

**108 Mass. 458; 14 Cox. C. C. 1; 2 Bishop, C. Law, 708.

***5 Cush. 295; 11 Cox. C. C. 336. A simple trespass upon property is not sufficient provocation to reduce the crime of murder to manslaughter. 45 Vt. 308. And a slight trespass to the person, may not be sufficient provocation, the circumstances of the case must govern. 10 Mich. 212. In the last case the fact that a boy had kicked a man on the shins, and the man had killed the boy in kicking back, was not allowed to reduce the offence from murder to manslaughter.

Resisting an illegal arrest is held in some cases, where the resistance has caused the death of the other person, to constitute simply manslaughter. 12 Cush. 246. But this is doubted—in May's Crim. Law, Sec. 137.

The test of the adequacy of the provocation is said to be, was it such as would among ordinary men excite the passions beyond control.* This is a question of fact for the jury, to be decided by them under instructions from the court as to the law upon the subject.**

Provocation cannot be made a cloak to cover express malice. That is, where there is express malice, provocation, as a rule, is not an important factor. So that however great the provocation, if the killing was malicious, and express malice is shown by the evidence, the crime is murder and not manslaughter.***

Where there is an unnecessary use of a deadly weapon to repel an assault from which death results, it is murder and not manslaughter, since the use of the weapon being unnecessary, it shows express malice.**** But circumstances may justify the use of a deadly weapon even where there is only an assault intended.*****

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*1 Bishop, C. Law, 710.

**10 Mich. 212.

***37 Mo. 466.

****7 C. & P. 817. Where the defendant had threatened to use a deadly weapon on any one who assaulted him, and doing so he was guilty of a malicious killing, that is, of murder rather than manslaughter.

*****38 Mich. 735. In this case the use of a deadly weapon was held not to constitute murder, where the defendant had been attacked by a large and vicious man, who had frequently killed people. But ordinarily one is not justified in using a deadly weapon when assaulted to repel such assault. It is one's duty to get away from the assailant if possible, or repel the attack without taking life.

Cooling Time. Where the defense of provocation is made as an excuse for felonious homicide, it becomes important to ascertain whether the defendant had time between the provocation and the committing of the offence to allow his passions to cool. This is known as *cooling time,* and if such time is found to have existed, then the provocation, however serious, cannot reduce the crime from murder to manslaughter.* There is no rule governing in each case what shall constitute cooling time, it all depends upon the circumstances of the case. But the main question is, has the mind been diverted so that the reasoning faculties could resume control? The question as to the adequacy of the provocation and the length of the cooling time will almost always be for the jury to determine as a matter of fact.**

Sec. 1718. SAME SUBJECT—INVOLUNTARY MANSLAUGHTER.—Involuntary manslaughter is distinguished from voluntary manslaughter because of the absence of the intent to kill. It involves the unlawful killing of a human being without intending to do so. Thus one who while committing an unlawful act, kills another without intending to do so is guilty of what is known in the law as involuntary manslaughter.***

One who occasions the death of another through negligence may be guilty of manslaughter, though

*69 N. C. 267.
**10 Mich. 212; 2 Bish. C. Law, Sec. 713.
***12 Cox. C. C. 530; 14 Id. 1.

he did not intend to kill or do bodily harm.* Such cases are seldom punished, however. The gross carelessness of a physician, resulting in death, will render him criminally liable; ordinary or slight carelessness will not.** So the chastisement of a child by a parent, resulting in its death, was manslaughter at common law.*** So the reckless discharge of firearms in the streets resulting in the death of a person, renders one liable to an indictment for manslaughter, and the same is true of other reckless injuries causing death.****

The neglect of a parent to procure medical attention for a sick child may or may not amount to manslaughter, if the child dies. If it is a matter of pure negligence it is manslaughter. But if through religious fanaticism that the child can be cured without medicine, it is not manslaughter at the common law, and the legislature must provide a remedy for such a case.*****

So a practical joke by which a person is killed may make those participating in it guilty of manslaughter.****** And the neglect to perform a duty, or criminal non-feasance, by which death results may

*1 Hawkins' Pleas of the Crown, Chap. 31.
**10 Cox. C. C. 525.
***2 Bishop, Crim. L. 683.
****2 Parker, Crim. Cas. 16; 47 Iowa, 647; 2 Cox. Crim.
*****10 Cox. Crim. Cas. 530; 13 Idem. 111.
******2 Lewis' Crim. Cases, 217.

amount to manslaughter. Thus if a parent starve his child, or a husband his wife.*

Sec. 1719. EXCUSABLE HOMICIDE.—Excusable homicide arises usually in cases where life is taken in self-defense. It is also called justifiable homicide sometimes, but technically, justifiable homicide is where a man kills another in the performance of his duty, as an executioner, and such cases seldom come before the courts.

Of excusable homicide it is said, it involves a little guilt, but not enough to deserve punishment.

There are three leading conditions under which homicide is excusable. 1. When committed in self-defense. 2. When committed in defense of one's habitation. 3. When done to prevent the commission of a felony.

One has a right to repel an assault with force, but must not go further than is necessary, or he will be held criminally responsible. The person assaulted should *retreat to the wall,* by which is meant that retreat where possible is to be made, and only when pressed to the wall, so that retreat is impossible, is it excusable to take human life.**

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*3 C. & K. 123; 32 N. J. Law, 169. 2 Bishop, Crim. Law, Sec. 686.

**3 Minn. 270; 5 Grey, 475; 34 Minn. 18; 15 Ohio St. 47. "But the true criterion between them (manslaughter and homicide in self-defence) seems to be this: when both parties are actually combating at the time when the mortal stroke is given, the slayer is then guilty of manslaughter: but if the slayer has not begun the fight, or having begun endeavors to

Where the assault, however, is made with a murderous intent, the person assaulted is justified in taking human life without retreating to the wall. Nor is a person in any case required to retreat when assailed, if to so retreat would endanger his own life. So one need not retreat when assaulted in his own dwelling house. Here he may stand his ground and kill his adversary.*

In self-defense one is justified in acting according to circumstances as they appear to him. If to him it appears that his life is in danger he may act accordingly, though there was not the danger he feared. But there must be reasonable grounds for this fear before he is justified in taking life.** If one provokes an assault and then kills the other in

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decline any further struggle, and afterwards being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence. For which reason the law requires that the person who kills another, in his own defence, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that not factitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. And though it may be cowardice in time of war between two independent nations, to flee from an enemy; yet between two fellow subjects the law countenances no such point of honor: because the king and his courts are the *vindices injuriam*, and will give to the party wronged all the satisfaction he deserves." 4 Bl. Com. 184, 185.

*9 Iowa, 188; 2 Wright (Pa.), 265; 8 Mich. 150.

**16 Ill. 17; 18 Mich. 314; 2 N. Y. 197.

order to overcome, he is guilty of murder, or at least manslaughter.*

In defense of one's habitation against a felonious attack one may take the life of a person. Thus in case a burglary is attempted, the slaying of such a person is not felonious. An attack upon a habitation is the same in theory of the law as an attack upon the person.** One may protect his property outside of his habitation by force, but not to the extent of taking life.***

The setting of spring guns in defense of property was allowed at the common law.**** But by statute in most states it is made an offence to set spring guns or dog spears.

Sec. 1720. SAME SUBJECT—JUSTIFIABLE HOMICIDE.—Justifiable homicide is where one takes life in the execution of some duty, as where a judge pronounces a sentence of death upon a convict, or an officer executes a death warrant. This kind of homicide is not always distinguished from excusable, where the act is done in self-defense.

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*23 Mo. 287; 24 Tex. 454.

**1 Hale, Pleas of the Crown, 486; 46 Ala. 67.

***24 Wend. 269; 45 Vt. 49. Where the protection of property also includes the prevention of a felony, the taking of life will be excusable. Perhaps not, if the felony is a secret one, as larceny. 8 Mich. 150; May's Crim. Law, 146. The taking of life is justifiable to prevent the commission of a forcible felony, as a riot, rape, or robbery. 31 Conn. 479.

****31 Conn. 479; 7 Marshall (Ky.), 478.

Sec. 1721. SAME SUBJECT—ROBBERY.—Robbery is the felonious and forcible taking from the person of another, goods or money of any value, by violence or putting in fear. The value of the property taken is unimportant, the gist of the offence is the taking by violence or force or its equivalent, as by putting in fear. Robbery is an offence against the person, and not against property, as is the case in larceny, where the amount taken is important as fixing the grade of the offence

1. To constitute robbery property must have been taken through violence. And this is said to involve a struggle, but this is an open question.*

Force or violence may be used for various purposes. Thus, it may be used to prevent resistance, to overpower the party, to obtain possession of the property, or to effect an escape. If one is detected in the act of stealing from the person, and uses force to make his escape, there is some conflict whether the offence is larceny from the person, or robbery.**

The force must have been met by resistance to constitute robbery. Simply removing property from the pocket of another by stealth is not robbery. So

*5 Jones (S. C.), 163.

**66 Ga. 246; 43 Ia. 413; 31 Am. Rep. 110. In the last case, where one of two confederates induced a person to exhibit money, and the other snatched it and ran away, the first one holding the victim to prevent capture, it was held not to be robbery.

snatching money from the hand of a person and running away with it does not constitute robbery.*

But if the property is detached from the person by force, however slight, this is considered sufficient to constitute robbery. Thus snatching a watch and breaking the chain in order to escape with it; and wresting a sword from the hand of another with intent to steal it, constitute robbery.** And pulling an ear ring from a woman's ear, and lacerating the ear was held to be robbery.***

2. Putting one in fear through threats is equivalent to force, and will constitute robbery. But the fear must be such as in reason is likely to induce the person to part with his property against his will. Thus it must be of personal violence, as where a pistol is used, or where a woman is made to pay money to prevent rape. Extortion of money through threats of criminal prosecution will not constitute robbery. This is extortion under the statutes but not robbery, since there is no fear of personal violence.****

3. The property must be taken from the person of the owner in robbery, or no offence against the per-

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*26 Pa. St. 123; 64 Ind. 131; 5 Parker's Crim. Cases, 279; Hale, Pleas of the Crown, 703.

**Russel's Crim. Law, 419; 2 East's Pleas of the Crown, 709.

***2 East's Pleas of the Crown, 703.

****12 Ga. 293. But it is held that a threat to accuse one of sodomy, is equivalent to force, and money obtained in such a manner would constitute robbery. 1 Parker's Crim. Cases, 198.

son is committed. It is sufficient if the property be taken from the owner's presence through force or by putting him in fear. So one compelled to open a desk for the robber that money may be taken therefrom, is nevertheless robbed of his property.*

The person robbed need not be the owner of the property taken. It is sufficient that he have the possession thereof, as this gives him a special title and ownership.** The taking of one's own property through violence does not constitute robbery. It may constitute a trespass or assault and battery, but not robbery.

Sec. 1722. RAPE.—Rape is the unlawful carnal knowledge of a woman, by force and without her consent.*** The chief ingredient in this crime is the wrong to the person. It is a very serious crime, involving the violation of the most sacred human possession, the chastity of woman.

Under the Jewish law it was punished by death if the woman were betrothed; otherwise by a decree that she became his wife for life. Under the Saxon law it was punished by death, and in England, at one time, by transportation for life, but now by penal servitude or imprisonment. In the various states it is punished by life imprisonment or for a term of years, and in some jurisdictions by death.

*8 C. & P. 237; 10 Crim. Law Mag. 85.
**8 Curtis, 215.
***12 Ohio St. 466.

Every male person fourteen years of age is presumptively capable of committing this crime. And every woman, irrespective of age, may be violated.* The offence may be committed on an unchaste woman, or a common prostitute. Character of the person violated, is admitted on trial, as bearing upon the question of force.**

The crime must be committed with force. The idea of the crime is that the woman must have resisted to the uttermost, and that such resistance was overcome by the accused.*** In this lies the distinction of this offence from seduction, adultery and the like offences against virtue.

A child under ten years of age, at common law, was incapable of given consent to sexual intercourse, so that notwithstanding such consent the party was guilty of rape. And the legislatures of the various states have from time to time raised this common law age of consent on the theory that it was too low. It varies at present in the various states from fourteen to eighteen years.

Consent of the female obtained through fraud will not protect the accused from having committed the crime of rape. Fraud is said to be equivalent to force, and will make the offence rape.**** But this is disputed.*****

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*1 Hale's Pleas of the Crown, 630.
**15 Ark. 624.
***11 Neb. 276; 45 Conn. 256; 59 N. Y. 383.
****13 Mich. 438.
*****50 Wis. 518; 94 Ind. 96; 8 C. & P. 265. A woman so

Sec. 1723. ABDUCTION AND KIDNAPPING. —Kidnapping, at the common law, was the offence of taking a person by fear or force from their own country and sending them into another.* The idea that the person kidnapped has to be transported beyond his own country has now been dropped, and the crime is completed without transportation beyond the person's own country. The injury to the person in kidnapping lies in the false imprisonment, but to constitute the offence there must be a carrying away as well as false imprisonment.

Abduction, at the common law, was the taking away of a maid, widow or wife for ransom. Now it is for the purpose of prostitution.** Both the crimes of kidnapping and abduction are now regulated by statute in the various states.

Sec. 1724. ASSAULT AND BATTERY.—An *assault* is an attempt to do bodily harm. A *battery* is the execution of the attempt. They are spoken of as *assault and battery*, as though they were a single offence, but technically speaking, there may be an assault without any battery, though not a battery without an assault. An assault is an inchoate violence to the person of another, with the present means of carrying the attempt

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far intoxicated as to be insensible is incapable of giving consent, and violating her chastity while in such a condition amounts to rape. 105 Mass. 376; contra, 50 Barber, 128.

*4 Bl. Com. 219.

**May's Crim. Law, Sec. 44.

into effect. This definition is a good one, as it shows that threats are not enough to constitute the offence, there must be violence actually offered or attempted.*

To constitute an assault there must be a present intention to strike manifested, or there is no assault. Thus, a conditional offer of violence is not enough.**

Mere preparation for an assault is insufficient. There must be a commencement of the act, which, if not prevented, would produce battery. So drawing a pistol, without presenting it, or cocking it, is held not to be an assault. Neither is picking up an axe while twenty-five yards away without attempting to use it; or picking up a stone without attempting to throw it*** Pointing a loaded pistol without intending to fire, or raising the hand or a stick without intending to strike, but in range, is an assault.****

The assault must be under such conditions that the battery is possible. The assailant must be so near at hand as to be able to execute the battery if he so wishes.

Putting one in fear by conduct creating a well-grounded apprehension of bodily harm is an assault,

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*43 Mich. 521; 1 Hawkins' Pleas of the Crown, 62.

**35 Ala. 363; 18 C. & K. 347. In the last case where the defendant had shook his fist in a man's face and said, "If it were not for your gray hairs, I would undo you," it was held not to constitute an assault. But such an act without the conditional remark would be an assault.

***30 Ala. 14; 28 N. C. 549.

****3 Smead (Tenn.), 66.

even though as a matter of fact there is no danger of bodily harm. As in the case of pointing an unloaded firearm at another.*

Battery. A battery is the unlawful beating or other wrongful physical violence inflicted upon a human being without his consent. Any injury, be it ever so slight, done to the person of another in anger and intentionally, is a battery in the eye of the law.**

Any unlawful act followed by physical injury to another is sometimes said to be a battery. Thus striking a horse one is riding or driving whereby injury follows to the person, is a battery, even though the person injured was not struck. So setting a dog on another, in consequence of which a person is bitten by the dog, is a battery. So the administration of poison, as by putting it in one's food, whereby injury is occasioned, constitutes an assault and battery. The inanimate thing which inflicts the injury is the innocent agent of him who, with criminal intent, causes it to act in the particular instance.***

The force used must be unlawful or unreasonable in extent, to constitute a battery, where as in making an arrest, or in disciplining a child, the right to use force exists.**** So the battery must be against the will of the party complaining. Where two persons go

*110 Mass. 447; 2 Bishop, Crim. Law, Sec. 32; Contra, 44 Tex. 43.

**114 Mass. 323; 1 Russell on Crimes, 557.

***43 Ind. 146; 114 Mass. 303; 2 Bishop, Crim. Law, Sec. 72.

****11 Eng. Law and Eq. 386; 17 Mass. 347.

out in anger to fight, it may constitute an assault and battery.*

Aggravated Assault. A distinction is observed in the law between a simple assault and what is called an aggravated assault. Whether an assault is aggravated or not depends upon the circumstances of the case. An aggravated assault constitutes a higher crime, and deserves severer punishment. At the common law it was considered as an aggravated assault, to assault a clergyman, or a member of Parliament, or to make an assault in the king's palace or in the courts of justice. But these distinctions do not maintain in this country.

Assaults with deadly weapons are generally punished as aggravated assaults. So assaults with specific intent to commit a higher crime than battery are classed as aggravated assaults, and punished more severely. In such cases the specific intent must be proved, as its existence is the gist of the crime.**

Under an indictment charging an assault with intent to commit a higher crime, one may be convicted of an assault and battery under the same indictment. This could not be done at the common law, as for an assault and battery, the accused was entitled to counsel, a copy of the indictment, etc., while if indicted for a felony he was not so entitled, hence it would not be proper to convict of assault and bat-

*32 N. Y. 525; 119 Mass. 350. Contra, 14 Ohio St. 437.
**19 Mich. 315.

tery under an indictment for felony, as this would deprive the accused of his rights in the premises.

Mayhem. At the common law, mayhem, was in some cases a misdemeanor, and in others a felony. In this country it is usually punished as an aggravated assault.*

Sec. 1725. CRIMINAL LIBEL.—Criminal libel is a censorious or ridiculous writing, picture, or sign, made with a mischievous and malicious intent towards government, magistrates, or individuals.** This was an indictable offence at the common law, and also by statute in this country. The theory of the common law as regards criminal libel was, that to punish it prevented a breach of the peace, since to indulge in libel before the public incited a breach of the peace. At common law, therefore, the truth of the libel was no justification. The maxim being, "The greater the truth, the greater the libel." But the contrary is now true, and a man may justify by proving that what he has said is true, when accused of criminal libel. Proof of the statements is a complete defense, the jury being the judges of the law and the fact.

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*41 Tex. 619; May's Crim. Law, Sec. 180. Mayhem is the offence of violently depriving a person of any limb, member, or organ useful in fighting, either offensive or defensive. But by statute any permanent injury or disfigurement is usually punished as mayhem.

**People v. Croswell, 3 Johns. Cas. 337, 354, definition by Alexander Hamilton, 2 Pick. 113; 4 Mass. 163; 25 Wend. 186; 7 Cow. 613; 13 Metc. 68.

Sec. 1726. OF OFFENCES AGAINST PROPERTY—ARSON.—The first of the offences against property to be considered—*arson*—is also an offence against the habitation, and involves an offence against human life.

Arson is the malicious burning of the dwelling house of another by night or by day. At the common law it was punished as a felony. The common law in regard to arson is changed somewhat by the various state statutes defining the crime.

The offence at the common law was against the habitation and the personal security of the family rather than against property. And it is the danger to human life, more than the destruction of property that makes the seriousness of the offence*

The expression *dwelling-house* includes any building within the curtilage, or enclosure including the buildings used in connection with the house proper. The building must be a complete house ready for occupancy, and not an abandoned one. It must also be used in some sense as a place of residence, or it is not a dwelling-house within the meaning of the law.**

The curtilage is that piece of land within which are included the dwelling-house and those buildings

*15 Wend. 159; 26 Mich. 106.

**20 Conn. 245; 15 N. Y. 153; 10 Cush. 480; 31 Me. 522; 2 Mich. 250; 1 Parker's Crim. Cases, 252. To burn a stack of hay on a farm is not arson, even though it be within the curtilage, because the thing burned must be affixed to the realty, and a stack of hay is not so affixed. 81 Ill. 565.

occupied and used in enjoying the residence. It is the same offence to burn a corn crib or other outbuilding within this strip of land, or curtilage, as to burn the house. It is not necessary that the land comprising the curtilage be enclosed or fenced in.*

To constitute arson there must be a burning. If the house is consumed there is no question, but where there is a mere attempt to burn the dwelling it becomes important to ascertain how far the attempt must proceed to constitute the crime of arson. It is held that some of the fibers of the wood must be charred, scorched, or discolored in order to constitute arson.**

At the common law it was not arson to burn one's own house.*** But this has been changed by statute in every state in the Union, and it is arson to burn one's dwelling in order to get the insurance thereon.****

A specific intent is not required to constitute the crime of arson, general malice is sufficient. Hence if one set fire to his own house with felonious intent, by which his neighbor's house is burned as a natural result, he is guilty of arson.***** But a burning the

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*2 Mich. 251; 8 Mich. 150; 31 N. J. L. 477; 28 N. J. L. 39; 17 N. Y. 151. It is said, however, that if the highway divides the barn or other building from the residence, it is not within the curtilage. 36 Mich. 309; 31 Me. 523; 26 Ohio St. 420.

**30 Tex. 346; 110 Mass. 403.

***26 Mich. 196; 54 Vt. 86.

****2 Pick. 325; 51 N. H. 176.

*****2 East's Pleas of the Crown, 1031.

house of another by mischance or negligence will not constitute arson. Though if the house of another is burned while intending to commit some other felony, the wrongdoer is guilty of arson. Otherwise by some authorities, if the wrongful act is but a misdemeanor.*

Sec. 1727. BURGLARY DEFINED.—Burglary is the breaking and entering of the dwelling-house of another in the night time, with intent to commit a felony therein. This is the common law crime of burglary, and involves: 1. A breaking. 2. An entry of the dwelling-house of another. 3. In the night time, and 4. With intent to commit a felony therein. Unless all these elements are present it is not burglary, though it may constitute some other offence. The dwelling-house includes out-buildings within the curtilage, the same as in the case of arson.**

Sec. 1728. SAME SUBJECT—ESSENTIALS OF THE CRIME OF BURGLARY.—1. A breaking is necessary to constitute a burglary. This may be accomplished by lifting a latch, turning a lock, or breaking through or lifting up a window, all that is necessary is the use of force, and where some force is used, the amount used or required to effect the breaking is not important.***

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*2 Bishop, Crim. Law, Sec. 15; May's Crim. Law, Sec. 53; 18 Johnson, 115.

**43 Ala. 17.

***22 Mich. 229; 8 Pick. 354; 1 Am. Dec. 216; 44 Mich. 303; 27 Mich. 151. Thus unlatching an inner door where the

Any slight opening left by the occupants of the dwelling is regarded as an invitation to enter, so that lifting a window partially raised has been held not to constitute a breaking; likewise the opening of a door partly ajar is not a sufficient breaking.*

A constructive breaking is sufficient where fraud or threats are substituted for force. Fraud and threats are considered as equivalent to force as regards a breaking in the crime of burglary. Thus if one enters the premises of another under the pretense of hiring lodging, or obtaining refreshments, and then commits a felony, he is nevertheless guilty of burglary.**

Breaking out of a house, which has been entered without breaking in, is not burglary. That is, to constitute a burglary there must be a breaking in, and not a breaking out of the house.*** This holding of the common law was changed by statute in England in the time of Queene Anne, but such statute did not modify the common law in this country.

The breaking must be of some part of the house excluding entrance, thus the breaking of an outer shutter over a window has been held not to be a suf-

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outer door is left open; removing an iron grating from a cellar window; introducing a knife between the upper and lower sash of an outside window; or raising a transom window attached by hinges above, all constitute a breaking.

*105 Mass. 588; 2 C. & P. 628.

**2 East's Pleas of the Crown, 486; 12 Ohio St. 146; 85 Pa. St. 54.

***51 Ga. 285; 70 N. C. 239; 82 Pa. St. 306.

ficient breaking; nor is the breaking open of a trunk or dresser or locker inside of the building sufficient.*

2. There must be not only a breaking, but an entry of a person, or some instrument used in accomplishing the felonious purpose. The entry of a man's hand for the purpose of accomplishing the felony, is a sufficient entry. So the entry of an instrument, used not for the purpose of breaking, but for the purpose of accomplishing the felonious purpose is a sufficient entry of a house to constitute burglary. The common illustration of this is, where a man thrust a stick with a hook on it through an open window and hooked out clothing with valuables in the pockets. But the entry of an instrument used to effect a breaking is not a sufficient entry to constitute burglary, otherwise if any part of the person enters to effect the breaking.**

3. Both the breaking and entry must be in the night time. And, independent of statute, "night-time" is not determined by the setting and rising of the sun. The question is not easily determined, and may involve both a question of fact and of law. If there is sufficient sunlight from which to reasonably discover one's features, it is day-time, even though the sun has set or has not risen.***

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*4 Ala. 623; 2 Bishop, Crim. Law, 98.

**4 Cox's Crim. Cases, 498; 2 Bishop, Crim. Law, 94.

***19 Cal. 578. The matter is regulated by statute in some States. Massachusetts has a statute providing that night-

4. The unlawful breaking and entry is not burglary unless there exists an intent to commit a felony therein. Thus the breaking into a house in order to get a more comfortable place to sleep is not a burglary; nor is it burglary if the intent is to commit adultery therein, as this is but a misdemeanor at the common law.*

Modern statutes have extended the crimes of arson and burglary to include other buildings than a dwelling-house, as store buildings and the like.

Burglary involves the felonious intent to commit a felony, and the doctrine of intent applies, so that drunkenness might be shown as a complete defense as negativing the intent. So, also, if one intended to commit a misdemeanor, and by mistake committed a felony, he could not be convicted of burglary. But if one entered the house to commit a felony on A's property, and A has no goods there, it is nevertheless burglary.

Sec. 1729. LARCENY.—One of the most common offences against property is larceny. There are several kinds of larceny at the common law, as *petit larceny, grand larceny,* and compound larceny.

Petit larceny, was the stealing of a small amount, as a few shillings in value; grand larceny involved

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time includes one hour after sunset and one hour before sunrise. 111 Mass. 395.

*12 Nev. 40; 16 Vt. 561. So if the intent is to commit a misdemeanor as assault and battery, it is not burglary. 2 Bishop, Crim. Law, 113.

the stealing of a larger amount, and compound larceny, was larceny aggravated by the circumstances, as larceny against the person, which was punished more severely than ordinary larceny.

The division of larceny into grand and petit larceny is retained under some modern statutes both for the purpose of jurisdiction, and for grading the offence. But in England and some of the states it has been dropped. Petit larceny, which is the offence of stealing a small amount of money, varying in the several states, is punished as a misdemeanor. While grand larceny, or the stealing of an amount larger than for petit larceny, is punished as a felony.

Larceny may be defined as the offense of taking and carrying away something of a personal nature, with a criminal purpose to profit by depriving another of it.*

Sec. 1730. SAME SUBJECT—THE ESSENTIAL ELEMENTS OF LARCENY.—1. There must be a taking and carrying away of the property of another with the intent of depriving the owner of the ownership therein. Thus, at the common law one might take a horse hitched in the street, and use it to make a journey and then abandon it, and be guilty of nothing more than a trespass; otherwise by modern statutes.

To constitute a taking and carrying away all that

*Larceny by the common law, is the felonious and fraudulent taking and carrying away of the mere personal goods of another. 3 Inst. 107; 2 Bish. Cr. L. Sec. 757-8.

is needed is a change of place of the property by the wrongdoer. The principle being, that if the thief have absolute control of the thing for an instant, the taking and carrying away is complete. Hence the changing of a horse from one part of a field to another, the other ingredients of the offence being present, constituted larceny.*

Manual seizure of the property is not always essential, it being held in an early English case, that coaxing a horse to follow one by offering him corn, or the like substance, constituted larceny. But killing an animal is not larceny, unless the carcass is carried away.**

2. One having possession, other than the legal possession, may yet be guilty of larceny touching the goods in his possession. Thus, where a servant misappropriates the property of his master, his custody is that of the master, and his wrongful act constitutes larceny.*** But a bailee, having real possession, cannot be guilty of larceny.****

The finder of lost goods, who has reason to believe that inquiry would lead to the discovery of the owner, is guilty of larceny if he appropriates the

*20 Ohio St. 518; 50 N. Y. 518; 4 Denio, 364; 56 N. C. 395; 45 Iowa, 48; 2 Bishop, Cr. L. 797.

**47 Cal. 103. So the return of the thing stolen would not purge the offence.

***99 Mass. 428.

****15 Wend. 581. Many of the common law charges of larceny are now punished as embezzlement.

property to his own use. But the criminal intent to steal and the finding must concur in point of time.*

Where goods have been mislaid, and a finder appropriates them to his own use, he is guilty of larceny at once. Such a case is to be distinguished from the one where the article has been lost and is found.**

3. A felonious open taking is nevertheless larceny. The fact that the taking is an open one may bear on the question of criminal intent; and it may also show that the taking was done under a claim of right, in which case it is not larceny.***

4. The taking must be by force, which is known in the law as a technical trespass in larceny. This involves some physical force, or its legal equivalent. But the application of the rule to concrete cases is quite difficult. Thus, delivery by mistake may be sufficient.****

So possession obtained by fraud amounts to a trespass which will make the offence larceny if only the possession and not the title passes. Thus obtaining money or property through fraud and then retaining it constitutes larceny. But obtaining credit

*116 Mass. 45; 29 Ohio St. 184.

**6 Cox's Crim. Cases, 415.

***41 Conn. 590.

****12 Cox. Crim. Cases, 260; 2 Bishop, Crim. L. 804. In the first case where a cashier had paid a man $100 by mistake on a $10 check, and having demanded it back, and being refused, it was held to constitute larceny on the part of the person receiving the money, since he must have intended to appropriate the money on receiving it.

under false pretences is not larceny of the goods so purchased, as the title passes as well as the possession.*

Sec. 1731. SAME SUBJECT—WHAT PROPERTY IS SUBJECT TO LARCENY.—All personal property of intrinsic value as such is subject to larceny. Thus, milk taken from a cow; turpentine from a tree; gas from a pipe line, and the like is property subject to larceny.**

At common law choses in action were not capable of larceny, as promissory notes and bills of exchange. But this is changed by statute in the various states.*** So wild animals in a state of nature are not subject of larceny, though after they have been reclaimed and brought under control, they may be subject of larceny.****

At the common law, base animals not fit for food, as dogs and ferrets, were not subject to larceny.***** But by the modern doctrine all tame animals of value are subject to larceny though not fit for food.******

*2 Bishop, C. Law, 812-813.

**2 C. & P. 423; 11 Iredell (N. C.), 70; 4 Allen, 308.

***May's Crim. Law, 160. The theory being that a note was the evidence of a debt, and this was such an intangible thing as to be incapable of being stolen.

****8 Grey, 497; 3 Dutcher (N. J.), 117. In the last case it was held that oysters, where planted and cared for by man, were subject to larceny.

*****Russell & Ryan, 350; 26 Ohio St. 400.

******86 N. Y. 365; 44 Ark. 479. So the fact that dogs are taxed makes them property and subject to larceny at the present time.

Realty, and things attached to the realty are not subjects of larceny at the common law. But after the property has been severed from the realty it becomes subject of larceny. But the severance and carrying away must not have been parts of the same act, but distinct acts at different times in order to constitute larceny of the severed articles.* Thus picking an apple from the tree is not larceny, while taking those lying on the ground would be. Apples on the tree are considered a part of the tree and real estate, but after they are severed from the tree they become chattels and subject of larceny. So if minerals are severed from the earth, crops from the land, fruit from the trees, and immediately carried away, the offence is not larceny; but if after having been severed, they are subsequently carried away, then it is larceny.**

The rule is not so strict as to fixtures constructively attached to the real estate, and they may be subject of larceny, even though the severance and carrying away are parts of the same transaction.*** And under modern statutes, in some states, where larceny is defined as the taking and carrying away of any thing of value, these common law rules as to things pertaining to the realty not being subject to larceny are greatly modified, so that manure may be

*64 N. C. 619; 4 Bl. Com. 232.
**8 Nev. 262; 26 Law. Rep. 299; 12 Cox. Cr. Cases, 59.
***11 Ohio St. 104; 14 Bush (Ky.), 31.

the subject of larceny, though it was not at the common law, as it was regarded as realty.*

The thing stolen must be something of value in the contemplation of the law, so that at common law, a chose in action, or evidence of a debt could not be stolen, but the paper on which it was written might be if it was of value.**

As there must be a specific intent to steal in order to constitute larceny, intoxication may be a complete defense to the charge. So anything negativing the specific intent, as that the property was taken under a claim of ownership, or by mistake, will be a defense.

Sec. 1732. RECEIVING STOLEN GOODS.—The receiving of stolen goods, knowing them to have been stolen, was a misdemeanor at the common law, and is made a felony by statute. At the common law this was only an accessorial offence and the thief must first be convicted before the accessory could be tried. But this is not the case now, as it is a distinct and substantive offence, and the receiver of stolen goods may be convicted regardless of the conviction of the thief.

Sec. 1733. SAME SUBJECT—WHAT IS NECESSARY TO CONSTITUTE THE OFFENCE OF RECEIVING STOLEN GOODS.—1. On a

*39 Ohio St. 650. So a dog may be "anything of value" under such a statute. 19 Ohio Law Bull. 150.

**1 C. & K. 725; 6 Cox. Crim. Cases, 304.

charge of receiving stolen goods the larceny must be proven. Though the thief need not be first convicted, it is necessary in the first instance to show that something has been stolen.*

2. The stolen goods must have been received into the actual possession of the accused. So if the party was merely bargaining with a thief to receive the goods the offence would not be complete.**

3. The accused must have known at the time he received the goods that they were stolen.***

4. The goods must have been received to defraud the owner thereof.****

5. The goods must be received without the consent of the owner.*****

6. In the indictment for the crime of larceny, a count for receiving stolen goods may be joined, and the accused convicted of either offence according to the evidence. And the receiver of stolen goods may be convicted in one state though the goods were stolen in another state.****** Recent possession of the

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*Harris' Crim. Law, 181. Receiving stolen goods from a wife which she had taken from her husband, was not sufficient to convict the party of receiving stolen goods, since the husband and wife could not steal from one another, on the ground that they are one. May's Crim. Law, 197.

**4 Cox. Cr. Cases, 412; 6 Cox. Cr. Cases, 554; 17 Iowa, 149. The receipt of goods by a servant for the master is sufficient as against the master. 6 Cox. Cr. Cases, 354.

***Harris' Cr. Law, 181.

****3 Heisk. (Tenn.), 215; 1 Parker's Cr. Rep. 554.

*****6 Cox. Cr. Cases, 449.

******2 Mass. 14.

goods stolen is evidence that the possessor stole them or received them knowing them to have been stolen.*

Sec. 1734. EMBEZZLEMENT DEFINED.—Embezzlement is the fraudulent appropriation of another's property by one who is in lawful possession, but who has not the title.** It is a crime kindred to larceny, but yet to be distinguished from it. There was no such crime as embezzlement by name at the common law, and similar offences were punished as larceny. By statute the crimes falling under this head are separated into a class of their own known as embezzlement. In larceny the possession is obtained wrongfully; while in embezzlement the possession is lawfully obtained, and the wrong consists in the misappropriation. The felonious intent to deprive the owner of his property is the same in larceny and embezzlement.

Sec. 1735. SAME SUBJECT—OF THE ESSENTIAL ELEMENTS OF EMBEZZLEMENT.—1. Embezzlement was not an offense at the common law distinct from larceny, and being a purely statutory offence, the statute defining it must be closely examined, as such offences are to be strictly construed.

2. There is a distinction between *possession* and *custody,* though the line is hard to draw. If one has

*7 C. & P. 571.
**99 Mass. 428; 2 Bish. Cr. Law, Sec. 325.

the mere custody of property and appropriates it he is guilty of larceny; while if he has the possession his offence is embezzlement. This distinction was not closely drawn at the common law, since there being no crime of embezzlement the accused had to be convicted of larceny or not at all. Thus, at the common law, a watch repairer would be guilty of larceny for converting his customer's watch, while at the present time his offence would constitute embezzlement.*

Money delivered to a servant for the master for a particular purpose and then converted to his own use, constitutes larceny, because the servant has simply the custody and not the possession of the money.** While if the money is delivered to the servant by a third person for delivery to the master, and the servant appropriates it, it is said to be embezzlement, as he has possession.*** So a clerk putting money in the till where it is regarded as being the property of the master, and then taking it out, is guilty of larceny.**** And the teller of a bank or a clerk of a store who after office hours abstracts funds, is guilty of larceny.***** The theory in all of these cases is that he took the funds after having relinquished possession.

3. The statutes defining embezzlement include the misappropriation of funds by an agent, clerk,

*May's Crim. Law, Sec. 97.
**99 Mass. 430; 5 C. & P. 145.
***2 Leach, 841.
****155 Mass. 523.
*****104 Mass. 548.

servant, officer, and the like, and these terms are sometimes given a technical meaning. A *servant* or *clerk* involves some one in continuous service, as does also the term *agent.* An *officer,* in such a statute, usually means some corporate officer, private or public. The terms *clerk* and *servant* in such a statute do not include *agent.**

4. Embezzlement involves a breach of trust, and usually possession of the property is gained by virtue of some employment.** A breach of trust, however, may amount to no more than a breach of contract, and to constitute embezzlement there must be present an intent to defraud.*** Failure to account for money according to contract is not embezzlement. There must be a felonious disposal of the property, indicating a design to cheat and defraud the owner.****

*May's Crim. Law, 98; 12 Cox. Cr. Cases, 56. All of the terms used in such a statute imply the existence of some relation of superior and inferior, and do not apply to independent contracting parties. 9 Gray, 5.

**31 Cal. 108; 14 Gray, 62.

***35 Ill. 487.

****62 Mich. 276; 120 Ill. 586. In the first case a woman at a distance had entrusted a man in Michigan with money to invest in mortgage securities. The man took the money, used it himself, and sent her interest from year to year, reporting that he had invested the money as directed and the interest sent was derived therefrom. The woman finally discovered the fraud, and the man at once confessed his wrongdoing and the woman decided to treat the obligation as a debt from him to her. Afterwards, not being able to get her money she prosecuted him for embezzlement. The court held that she

Sec. 1736. OBTAINING MONEY OR PROPERTY UNDER FALSE PRETENSES.—The offence of *false pretenses* is clearly allied to fraud, but there can be fraud without false pretenses; though not false pretenses without fraud. This is a statutory offence. At the common law there were "cheats by false tokens," but a simple false statement of fact was a non-criminal falsehood. False tokens at common law included, false dice, false weights or measures, false reading of a paper, and selling goods under a false label.*

False pretenses as a crime is to be distinguished from larceny. In obtaining property by false pretenses the one obtaining the property must obtain something more than possession; he must obtain the title. Otherwise the crime is larceny. If the title to the property is obtained it is false pretenses.

Sec. 1737. SAME SUBJECT—INGREDIENTS OF FALSE PRETENSES AT COMMON LAW. —The common law ingredients of false pretenses are: 1. There must be a false representation of a past or existing fact.** As a pretense which is true, is not criminal, even though the accused thought it to be false.*** A false expression of present intention is not an indictable false pretense. It may constitute

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had by her conduct created their relation into debtor and creditor, and that the man was not guilty of embezzlement.

*6 Mod. Rep. 101; 7 Johns. 201.

**22 N. Y. 413; 11 Cox. Cr. Cases, 589.

***3 C. & P. 420.

a fraud, but not a criminal false pretense.* A statement of opinion may involve a representation of fact, as where one claims to possess supernatural powers.** So the false pretense may be expressed or it may be implied from actions and conduct.***

Giving a check on a bank where one has no funds is a false pretense for which one may be held criminally liable, where there is no question but that the accused knew he had no funds in the bank, or where he never had any there.****

The pretense must have been made with intent to deceive. For if it is made on the belief that it is true it is not criminal.***** And it is held that if a man lose his own property, he has a right to regain it by false pretenses.****** The false pretenses must have deceived, since if the complaining party was aware of its falsity there is no crime. But there are two rules as to this question of deceiving. Under the earlier rule the pretense must have been such as would have deceived a man of ordinary intelligence and caution.******* But by the modern rule the question is not as to the extent of the deceit, or whether or not it would have deceived

*17 Mich. 486.
**10 Cox. Cr. Cases, 44.
***7 C. & P. 784.
****77 Cal. 173; 135 Ill. 405.
*****11 Cox. Cr. Cases, 328.
******7 C. & P. 354; 3 Hill (N. Y.), 169.
*******50 Ind. 473.

an intelligent man, but is, *did it deceive the party in question?**

The false pretense must have defrauded. That is, something of value must have been parted with in reliance on the pretense. But it is not necessary that the false pretense should be the only inducement to the parting with the property. It is enough if with other facts it accomplishes the fraud.**

The property obtained must be such as is subject to larceny. The obtaining of credit on account is not sufficient, nor is the obtaining of an endorsement of payment upon a note.*** Where both parties to a transaction are guilty of false pretenses neither has a defence to a charge preferred by the other.**** Modern statutes usually punish offences known at common law as cheats by false tokens.*****

Mere puffing of one's wares is not indictable. But any trick or artifice whereby the buyer is defrauded amounts to false pretenses.******

Sec. 1738. FORGERY DEFINED.—Forgery is the fraudulent making or altering of a writing to the prejudice of another's rights.*******

Sec. 1739. SAME SUBJECT—THE ESSENTIAL ELEMENTS OF FORGERY.—1. The instru-

*76 N. Y. 258; 14 Ill. 314.
**35 N. Y. 445.
***15 Iowa, 412; 75 Wis. 490.
****8 Cush. 57.
*****107 Mass. 486.
******4 Denio, 525; 14 Wend. 546; 2 Bishop, Cr. Law, 447.
*******4 Bl. Com. 247.

ment forged must have pecuniary importance. Thus a forged letter introducing one to the hospitality of another is not forgery; and the forgery of an artist's name making an etching a "signed proof," has been held not to be forgery, as it did not place a pecuniary obligation upon any one.*

2. Where the forgery consists in the altering of a written instrument, the alteration must be in a material part. As forgery consists not only in signing a false name to an instrument, but also in the alteration of an instrument that was otherwise genuine, the rule requires that this alteration should be in a material part.** Any alteration which changes its legal effect is the alteration of a material part. But the alteration of an instrument having no legal or pecuniary effect is not forgery. Thus where the alteration was of a void bond, the alteration involved no pecuniary loss to any one and was not forgery.*** So if the alteration does not change the legal effect it is not forgery, being considered as of no importance.****

3. It is not necessary that the name forged should be of some person in being or having legal capacity. The name of a fictitious person, or one deceased may be forged, and constitute the crime of forgery.*****

*67 Ill. 911; 7 Cox. Cr. Cases, 494. But forging a letter of recommendation may amount to the crime of forgery if it involves financial obligation. 2 Greenleaf (Me.), 365.

**27 Iowa, 420.

***2 East's Pleas of the Crown, 953.

****6 Mass. 519.

*****13 Ohio, 453; 21 Wend. 309.

4. The writing forged must purport to be the act of another. But one may forge his own name if he represents it to be the signature of another. So fraudulently inducing one to sign an instrument he did not intend to sign is sometimes held to amount to a forgery. As where one is by artifice induced tc sign a promissory note believing it to be some other writing, such a note, if the signer has been guilty of no negligence is void in the hands of bona-fide holders as a forgery.* But fraudulently misreading an instrument signed by another is not forgery.**

5. It is not necessary that the forgery should be successful. The crime is in the act with intent to make use of the document, and does not involve the question of the success of the wrongful act.***

Sec. 1740. UTTERING FALSE PAPER.—The uttering of false paper is akin to and closely allied to forgery. It is made a substantive crime by statute in every State. The offence is broader than the uttering of forged paper; the paper may or may not be forged. This is a statutory offence, and consists in the offering, whether accepted or not, a false or forged instrument, with the representation by words or actions, that the same is genuine.****

Sec. 1741. SAME SUBJECT—WHEN THE OFFENSE OF UTTERING FALSE PAPER IS COM-

*11 Gray, 197; 1 Bishop, Cr. Law, 584; 2 Bishop, 585, 589.
**22 Pa. St. 390.
***15 Mass. 526.
****48 Mo. 520.

PLETE.—1. The offence is complete when the false instrument is offered, it is not necessary that it should be accepted.* This uttering or offering may be in various ways, as putting a forged deed on record, or a forged mortgage, is sufficient.** So bringing suit upon a forged note, knowing it to be forged, is uttering forged paper. And any attempt to make use of the false instrument as genuine is sufficient.***

2. It is not necessary that the crime of forgery should have been committed, it is sufficient if it is a false instrument.****

Sec. 1742. COUNTERFEITING DEFINED AND EXPLAINED.—Counterfeiting is the making of a false coin in the similitude of the genuine with intent to defraud. This is the common law definition, which has been enlarged by modern statutes to cover the making of false paper money.***** Counterfeiting is punished by the United States statutes and by state statutes, and is a felony of a high grade. At the common law it was classed with cheats and was but a misdemeanor.

Counterfeiting as a crime resembles forgery, but it is to be distinguished therefrom in that in forgery there need not be a resemblance between the forged

*25 Mich. 388.
**3 Abb. App. Dec. 439; 27 Mich. 386.
***15 Upper Canada (Q. B.), 118.
****1 Bishop Cr. Law, 204.
*****1 Hale, Pleas of the Crown, 184, 215; 1 Ohio St. 185.

signature or part and the genuine, while in counterfeiting the gist of the offence is in part in the likeness or similitude of the false to the genuine.*

The offence of counterfeiting is a crime against both the state and the United States. The two offences are distinct, and both may be punished without violating the constitutional provision as to being tried twice for the same offence. But as a rule one is not punished under both statutes for counterfeiting, but it might be done.

Sec. 1743. MALICIOUS MISCHIEF DEFINED. —Malicious mischief is a malicious injury to the property of another. It is a common offence, but frequently escapes punishment. At the common law this offence was punished as a misdemeanor if it was done in the night time or involved cruelty to animals. The statutory offence does not make this distinction and involves all forms of malicious injury to property, buildings, dams, and the like.**

The crime of malicious mischief is complete whenever there is a wanton or reckless destruction of property. Express malice against the owner of the property destroyed is not essential.***

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*9 How. (U. S.), 560.

**5 Denio, 277; 8 Gratt. (Va.) 708. The killing of a dog was not malicious mischief at common law, as a dog was not regarded as property. But this is now changed and it would be so, as dogs are recognized as having value and are protected as property.

***72 Mich. 172.

OFFENCES AGAINST PUBLIC JUSTICE.

Sec. 1744. PERJURY DEFINED.—Perjury is a wilful false swearing, in a court of justice, on matter material to the issue. This is the common law perjury. The taking of a false oath may be made perjury. The offence is a difficult one to establish on account of the technicalities involved. (44 Ala. 81; 2 Metc. Ky. 10; 39 Miss. 541.)

Sec. 1745. SAME SUBJECT—INGREDIENTS OF THE CRIME OF PERJURY.—1. There must be a lawful oath or affirmation, and this oath or affirmation must be before a competent officer, and in due form of law.*.

An oath is a declaration of fact made on an appeal to the Supreme Being for its truth. An affirmation simply omits the appeal to the Supreme Being, as a privilege to those who have religious scruples about appealing to the Supreme Being. By statute the taking of testimony in both civil and criminal matters is required to be upon oath or affirmation. Formal omissions in administering an oath are not important.**

2. The oath must have been given in some judicial proceeding, or in some proceeding in a cause in court.*** The offence also includes a false oath to an affidavit required by law. False swearing is indictable only when it perverts the course of justice, or is made

*4 Parker's Crim. Cases, 213.
**17 N. H. 373.
***16 Iowa, 36; 42 Vt. 446; 26 Me. 69.

in the trial of a case, or some oath required by law. It is perjury just the same though the testimony falsely given was voluntary and not under compulsion. An oath is sometimes spoken of as a *corporal* oath, by which is meant that it is made with a corporal sign, as by uplifting the hand, kissing or laying the hand on the bible.*

3. While some outward form is necessary in administering an oath to make it complete, it is said that the exact form is directory and need not be that required by the law, provided it involves some solemn corporal manifestation.**

4. The oath must be wilfully false as to some past or existing fact. False swearing by mistake is not perjury.*** Whether negligent false swearing constitutes perjury is in conflict, with perhaps the weight of authority that it is not.**** So an oath of office, amounting simply to a false promise, when broken, is not perjury. The theory of the law is that the intent to swear falsely is perjury, so that if by mistake or accident the accused told the truth when intending to swear falsely, he is still guilty of perjury.***** Voluntary intoxication is perhaps no defence to perjury, though it might negative the intent.******

The state courts have no jurisdiction to punish per-

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*9 N. H. 96.
**86 N. Y. 154; 11 Allen, 243. But see, 3 Minn. 444.
***36 N. Y. 444.
****2 Bishop Cr. Law, 1047.
*****Harris' Cr. Law, 73; 2 Bishop Cr. L. 1043.
******2 Bishop Cr. L. 1048.

jury occurring in the federal courts, as this is an offence against the United States and must be punished by that sovereignty.*

5. The testimony falsely given must have been material to the issue, or it does not constitute perjury.** But the courts are divided as to whether the materiality of the false swearing is a question for the court or jury.***

6. At the common law one could not be convicted of perjury except on the oath of two witnesses. The object of this was to prevent a man's being convicted on a single individual's testimony. But at the present time the question is for the jury to determine whether the accused wilfully swore what he knew to be false, and their decision as to this need not be founded upon the testimony of two witnesses.****

Sec. 1746. SUBORNATION OF PERJURY.—Subornation of perjury consists in procuring another to take a false oath. The essentials of the crime are:

1. The false oath must amount to perjury, if it does not, the offence is not complete. At the common law both the parties were held guilty of perjury. But now, subornation of perjury is an independent offence provided for by statute.

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*32 Ark. 117.

**12 Metcalf, 225; 2 Bishop Cr. Law, 1033. It need only affect a collateral issue, but it must be material to the issue being tried.

***May's Cr. Law, 188; 2 Bishop Cr. Law, 1039.

****29 Ind. 442; 10 Ohio St. 252.

2. Both parties must believe the matter sworn to be false.

3. Solicitation to commit perjury, even though the solicitation failed, was punished at the common law as an indictable attempt.

Sec. 1747. BRIBERY.—Bribery in law, is an offence against public justice, and at the common law consisted in the receiving of an undue reward by a judge or other officer concerned with the administration of justice to influence his action.* Bribery at the common law was but a misdemeanor. It is now punished by statute in the several states, and these are not uniform in their provisions. But such statutes usually group and punish bribery of judicial officers, administrative officers, and electors at elections, and those concerned with the holding of elections.

As to what constitutes bribery in a particular case depends largely upon the statutes of the state where the offence was committed, which must be consulted, as the statutory offence of perjury is not in conformity to that of common law perjury. The statutes also make attempts to bribe punishable as complete offences.

In the offence of bribery as to elections, one who votes for reward is as guilty of bribery as the one who induces him to vote. And the mere refraining from

*Bribery may be defined to be the giving, and perhaps the mere offering, to another, anything of value, or any valuable service, intended to influence him in the discharge of a legal duty. 10 Iowa, 212. See, 4 Bl. Com. 139; 33 N. J. Law, 102; 36 Tex. 293.

voting for reward constitutes bribery as well as voting for reward. The gist of the offence of bribery is the perversion of justice and the violation of the purity of public law.*

Sec. 1748. EMBRACERY.—At the common law, embracery was the offence of proffering to jurors money, entertainment, entreaties, promises, or threats, or other improper inducements, with intent corruptly to influence their action.**

Sec. 1749. COMPOUNDING A FELONY.—Compounding a felony, is also an offence against public justice. It is a forbearing to prosecute a felon on account of some reward received. At the common law compounding a felony was a misdemeanor. The mere forbearing to sue will not constitute the offence, and at the present time, under state statutes, the offence is not complete unless the party has taken steps to prevent the accused from being brought to justice, as by seeking to prevent the witnesses from testifying in a court of justice, or by making an agreement with the accused not to appear.

There are some offences, as misdemeanors, which the common law allowed the parties to compromise; under the state statutes the only one of importance is assault and battery, and it frequently is required to be done

*Virginia Cases, 460; 2 Bishop Cr. Law, 86.

**5 Day, 260; Co. Litt. 369; 2 Nev. 268. The offence of attempting to corrupt a juror is punishable by statute, but is not usually called embracery.

before a justice of the peace who must approve the transaction of settlement.*

Sec. 1750. PRISON BREACH.—Another common law offence against public justice was prison breach, or a breaking and going out of a prison by one lawfully confined therein. The elements of this offence are:

1. There must be an actual breaking. That is, some force must be used. Simply going out through an open door would not constitute prison breach.

2. The person must escape or the offence of prison breach is not complete. An attempt not constituting the offence.

3. By a prison is meant any place of confinement. Thus stocks and yards where persons are confined for the purpose of labor are prisons from which a breaking will constitute this offence. But the imprisonment must be lawful, that is, under authority of law. Whether the person is innocent or guilty, if the confinement is lawful the breach of prison is complete if he escape. Breaking from prison to escape death by fire or other danger is not criminal.

Sec. 1751. ESCAPE.—Escape is another offence against public justice and consists in delivering one from lawful imprisonment, or relaxation of imprisonment by a stranger or one in charge of the prisoner.** This may be either a substantive or accessorial offence.

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*5 Mass. 310.

**4 Steph. Com. 234; 18 Pick. 440.

As a substantive offence it is punished as *rescue,* and as an accessorial offence it is punished as being accessory after the fact to the original crime.

Escape is of two kinds: 1. Where the prisoner voluntarily escapes from lawful imprisonment. 2. Where an officer voluntarily or negligently suffers a prisoner to escape.* The offence is regulated by statute in the various jurisdictions.

OFFENCES AGAINST PUBLIC PEACE.

Sec. 1752. AFFRAY.—An affray is a fight by mutual consent of two or more persons, in some public place to the terror of the people. The gist of the offence seems to be the terror to others. A mere wordy dispute, without a blow struck or a weapon drawn is not an affray.** So one who fights simply in self-defence is not guilty of an affray.*** And as two parties are necessary to cause as affray, if one is acquitted the other cannot be convicted.**** So the offence must be committed in a public place, or in view of the pub-

Sec. 1753. RIOT.—A riot is a tumultuous disturbance of the peace by three or more persons assembling together of their own authority, with an intent mutually to assist one another, against any who shall oppose them in the execution of some enterprise of a lic.*****

*1 Wend. 398; 6 Mo. 8; 6 Abb. Pr. 206.
**13 Ga. 322; 16 Ala. 65.
***1 Blackf. (Ind.) 377.
****13 Ga. 322; 16 Ala. 65.
*****5 Yerg. 356; 22 Ala. 15.

private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act be of itself lawful or unlawful.*

Putting the public in terror is the gist of this offence. It was a misdemeanor at the common law, but is punished at the present time as a very serious felony, where punished at all, which is not often.

Sec. 1754. SAME SUBJECT—ESSENTIAL ELEMENTS IN RIOT.—1. The concurrence of three or more persons is required, otherwise it would constitute an affray, but not a riot.** The number is sometimes changed by statute. In slavery times it was held that two freemen and one slave might make a riot. If two do the active mischief, and the third is present abetting, the three are guilty of riot.***

2. As to how much must be done in order to render the several parties guilty of riot is not always clear from the authorities, as there are other crimes kindred to riot. As a rule to complete the offence of riot: The son.****

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*This is the definition by Hawkins. Pleas of the Crown, Ch. 65, Sec. 1. Riot is such disorderly conduct in three or more persons assembled and actually accomplishing an object as is calculated to terrify others. 2 Bishop Cr. Law, Sec. 1143.

**2 Ill. 150.

***33 Me. 554; 2 Bishop Cr. Law, Sec. 1146.

****4 Ind. 114; 5 C. & P. 154; 42 Ind. 273. In the last case it is said that the term riot does not involve the idea of an unlawful act done. If three or more persons do any act in a violent and tumultuous manner, there is a riot.

thing contemplated must be executed; that is, the purpose for which the several parties came together must be accomplished. This purpose may be an attempt to put in fear, or obstruct the business of some per-

When the act contemplated is executed it is a riot. If the persons have only assembled with intent to execute an act, this constitutes an *unlawful assembly,* and not a riot. The unlawful assembly is punished by statute in most states. Where the parties have attempted to execute their purpose and failed it is called a rout.*

Sec. 1755. CONSPIRACY.—Conspiracy is an agreement between two or more persons to do an unlawful thing, or to do a lawful thing by unlawful means. This is one of the most difficult crimes to prove known to the law.

Sec. 1756. SAME SUBJECT—THE ESSENTIAL ELEMENTS OF CONSPIRACY.—1. The gist of the offence of conspiracy is in the agreement to do the unlawful act, so that the offence is complete though nothing be done under the agreement.**

2. A conspiracy to do a criminal act, or a lawful act by criminal means, are equally punishable.*** Some

*4 Bl. Com. 146; 15 Cox Cr. Cases, 138; 45 N. H. 83. In the case in 15 Cox Cr. Cases, an attempt to suppress the Salvation Army street meetings as a riot was unsuccessful.

But persons may assemble for a lawful purpose, then becoming riotous be guilty of a riot. 2 Bishop Cr. Law, Sec. 1150.

**5 McLean (U. S. Cir. Ct.), 213; 25 Vt. 415.

***2 Term Rep. 734; 6 Ala. 765.

authorities hold that the unlawful act must be criminal in order to constitute conspiracy, but this is not the weight of authority.* As a rule, conspiracies to injure or disgrace one in his character or business are indictable conspiracies.** So conspiracies to pervert the course of justice, as by influencing the court or jury; or to wrongfully injure or prejudice others are indictable.***

3. A conspiracy to commit a felony is merged in the felony when the crime is actually carried out. That is, the merger is to the extent, that if the defendant is convicted of the felony he cannot also be convicted of the conspiracy, but if not charged with the felony he might be convicted of the conspiracy.****

Sec. 1757. CRIMINAL FORCIBLE ENTRY AND DETAINER.—Criminal forcible entry and detainer is the crime of taking forcible possession of, or forcibly detaining the possession of lands and premises without right in breach of the public peace. It is to be distinguished from the civil action of forcible entry and detainer, which lies to recover the possession of

*4 Halstead (N. J.), 93.

**25 Ill. 17; 2 Ld. Raym. 1167.

***6 Term Rep. 619. Conspiracy to commit a felony, is punishable as severely as the act itself in most States.

****48 Me. 218; Harris' Cr. Law, 112. But a misdemeanor does not merge the conspiracy to commit it. 15 Me. 100; 4 Wend. 265.

Intoxication, disorderly conduct, and the like are also offences against the public peace, but, as they are of a trivial nature, space cannot be given to them here.

lands detained from the lawful owner. Criminal forcible entry and detainer was an indictable offence at the common law. And is now regulated by statute in the various states. It consists in violently taking or keeping possession of lands or tenements with force and arms and without authority of law. The gist of the offence being the actual or threatened personal violence to the terror of the people.*

Sec. 1758. SAME SUBJECT—ELEMENTS OF CRIMINAL FORCIBLE ENTRY AND DETAINER.—1. Threatened injury to property is not sufficient. The threats must include injury to the person. So the force required must be more than "a gentle laying on of hands."** The owner of premises may recover them by lawful force, and may retain his own property by force, and his doing so is no offence.

The offence may be committed by one or many; and the offence may be complete though no one is present, as in contemplation of law some one is always present. If there is a tendency to disturb the public peace by the forcible entry and detainer, the crime is complete though no one is present.***

2. Only corporal lands and tenements can be forcibly entered or detained. Personal property is excluded and so are tenements incorporeal. It is not necessary that the person in possession should have title to the property. That is, the crime is no less complete

*4 Bl. Com. 148; 4 Cush. 141; 43 N. Y. 152.
**5 Cush. 214.
***52 Barb. 198.

if the person wronged is without title, so long as he has the peaceable possession. But simple custody is not sufficient possession. Thus a master has a right to put his servant out of possession of property of which he has the custody without exercising that degree of care which he would be required to exercise as to others.*

Offences Against Morals and Religion.

Sec. 1759. ADULTERY.—Adultery is not treated as a crime against the person, nor against the public peace, but as a crime against morals. It was not a criminal offence at the common law.

Adultery is voluntary sexual connection between persons of opposite sexes, one of whom is married. It is punished as an offence in every state in the union. While not punished at common law, it was grounds for divorce.

Sec. 1760. SAME SUBJECT—ELEMENTS OF THE CRIME OF ADULTERY.—1. In some of the states, by statute, to constitute adultery, one of the parties must be a married woman, so that a married man would not be guilty of the crime by having illicit relations with a single woman.**

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*May's Crim. Law, 169; 64 N. C., 378.

**4 Minn. 335; 11 Ga. 53. This rule does not prevail where the adultery is charged in a divorce proceeding. In some States an unmarried man is not guilty of adultery in any case. 2 Dallas, 124.

2. The offence of living in adultery involves something more than a single act of illicit intercourse.*

3. Both parties in adultery cases may be charged and tried together. And one may be convicted and the other acquitted; as where one is released on the ground of intoxication.** n some states the complaint must be made by a party to the marriage contract violated. So it has been held that a man may be convicted of adultery though he believed the woman unmarried, and married her before cohabitation.***

4. Where in a statute the term "adultery" is used but not defined, the offence is adultery on the part of a married person, and only fornication on the part of the unmarried person.****

5. In order to constitute adultery, there must be a subsisting marriage at the time of the illicit relation. If one of the parties is divorced, and the other single, it is not adultery. So cohabitation under a second marriage entered into in violation of a decree of divorce is not adultery.*****

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*39 Ala. 554; 116 Ind. 464.

**131 Mass. 577.

***11 Allen, 23; but see, Bishop. Stat. Crimes, 357.

****21 Pick. 509; Bishop Cr. Law, 656.

There are various other offences against morals and religion, as fornication, seduction and incest, blasphemy and profanity, which are defined in the statutes of the various States. Fornication differs from adultery in that it does not necessarily involve the existence of any marital relation. In many States illicit relations between persons of opposite sexes, neither of whom is married is not punished as a crime.

*****43 Me. 258. But if the statute makes it adultery for

6. If a husband find his wife in the act of adultery and kill her paramour he is deemed guilty of manslaughter and not murder. The provocation under these circumstances is held to reduce the crime from murder to manslaughter, but will not excuse the crime. But after cooling time has elapsed the provocation will be no defence to a charge of murder for killing the paramour.*

7. Where fornication is a statutory offence, one indicted for adultery may be convicted of fornication.

Sec. 1761. SAME SUBJECT—RULES OF EVIDENCE AS TO ADULTERY.—1. Where the husband or wife is defendant, neither can testify against the other. That is by reason of statutes excluding such evidence, on grounds looking to the protection of the marital relation. But the rule does not apply where the adultery is charged in a divorce proceeding by one against the other. And either may testify against an adulterer who is not a party to the marriage relation.** In some states neither the husband or wife can make complaint against the other.***

2. The fact of marriage must be proved, simple evidence of cohabitation and reputation is not sufficient. The fact of marriage may be shown by the confession of one of the guilty parties.****

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one divorced to have illicit relations with another in violation of the decree, then it is adultery.

*8 C. & P. 182; 35 Ind. 80; 62 N. Y. 229.

**21 Mich. 509.

***42 Mo. 572; 1 Gratt. 218.

****39 Mich. 208; 1 Bishop, Marriage & Divorce, Sec. 442.

3. It is not necessary to prove the particular time and place of the adultery committed, but the jury must be satisfied beyond a reasonable doubt as to some time and place where the act was committed.

4. Acts of familiarity prior to the time charged may be shown as substantiating the claim. So may subsequent acts. But they must not be too remote in point of time unless they form a connected series of improprieties.*

Sec. 1762. BIGAMY.—Bigamy consists in having a plurality of wives or husbands. At the common law the offence was punished in the ecclesiastical courts, but it is now a statutory offence in England as well as in the various states in this country.**

Sec. 1763. SAME SUBJECT—ESSENTIALS OF THE CRIME OF BIGAMY.—1. The first marriage must have been legal, and must be clearly proved.***

*2 Gray, 454; 53 Mich. 525. The crime of adultery must be prosecuted within a limited time, which time is usually one year in most jurisdictions. In such case acts more remote than a year would not substantiate the offence. As a crime the defendant may be convicted on his own confession, but in divorce cases such a confession is not sufficient.

**Bigamy is the crime of contracting a second marriage with actual or constructive knowledge that a previous marriage is still binding. The English statute excepted the cases of a person legally divorced, and a person whose husband or wife may have remained absent without being heard of seven years before the second marriage. The statutes in the United States usually contain similar exceptions, and sometimes others are added. The offence is also called polygamy in some States. 1 Russ. Crimes, 185.

***Bishop, on Stat. Crimes, 593.

2. The offence is punishable only in the jurisdiction where the second marriage is solemnized, and in the very county where the marriage is solemnized. But the statutes may provide that the offence may be punished in any county in the state as well as the county where the marriage takes place.*

3. A party may be guilty of bigamy if he marry in violation of a decree of divorce. But this depends a good deal on the wording of the statute. Thus, if the decree provides that neither of the parties shall marry within a prescribed period, and the statute sanction such decree and makes its violation bigamy, then the parties marrying in violation of it are guilty of bigamy. But such decrees are not of any validity outside the state in which they are made, so that the parties may marry in another state, and can then go back to the state where the decree was made and not be punishable.** But the rule is otherwise where the divorce obtained in a foreign state has been granted without proper jurisdiction of the parties.***

A *bona fide* belief that the husband or wife was dead at the time of the second marriage is a good defence, by the weight of authority.****

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*8 Pick. 483; 86 Ky. 122. It is not necessary that the second marriage should be valid or in due form, a common law marriage is usually sufficient. 34 Mich. 339; Bishop, Stat. Crimes, Sec. 590.

**113 Mass. 458.

***25 Mich. 247.

****23 Q. B. Div. 168; 46 Ind. 459. Contra, 65 Me. 20; 7 Metc. (Mass.) 472.

CHAPTER IV.

OF THE RIGHTS OF THE ACCUSED AND CRIMINAL EVIDENCE.

Sec. 1764. THE SUBSTANTIAL RIGHTS OF THE ACCUSED IN GENERAL.—By a long process of development and express declaration dating from Magna Charta certain rights have been recognized as belonging to any person accused of crime. These are now guaranteed by the federal and state constitutions and statutes and must be observed in the trial of a person for crime. They include the following:

1. Right of trial by jury.
2. The right to defend in person.
3. The right to be represented by counsel.
4. The right to be confronted by the witnesses.
5. The right to have his guilt established beyond a reasonable doubt.
6. The right to a speedy trial.

These will now be considered briefly, in their order.

Sec. 1765. THE RIGHT TO TRIAL BY JURY.—The right to a jury trial by a person accused of crime, is a common law right, preserved by the constitutions of the several states, and the constitution of the United States, as to trials in the federal courts. Where this right is preserved by the constitution of the

state, as it is generally, it cannot be modified or abridged by the legislature. Neither can it be waived by the accused, if he stands trial, but he may plead guilty and be sentenced without trial.*

The jury must consist of twelve men qualified to sit, and a unanimous verdict is required for conviction. This is what is meant by a jury trial, and where the state constitution guarantees it, it could not be changed without a constitutional amendment.**

Sec. 1766. THE RIGHT OF THE DEFENDANT IN A CRIMINAL CASE TO DEFEND IN PERSON.—The right of the accused to defend in person is also a common law right, and is now guaranteed by the constitution in the various states. This gives the defendant the right to make his own defence, and he need not employ an attorney. In some instances this may be done in civil cases also.

This right to appear in person involves other important rights, as:

1. The accused is entitled to be personally present at every step of the prosecution, from the arrest to the sentence. And this right cannot be waived by the accused. Perhaps the rule does not apply so strictly to trials for misdemeanors, unless the offence involves

*38 Mich. 742. But this does not apply to those minor offences involving police and sanitary regulations.

**16 Mich. 351; 29 Mich. 31; 32 Mich. 1.

corporal punishment, as imprisonment.* The right may be forfeited by the accused escaping from the court room during the trial.** But absence on account of sickness would not be such a waiver.*** Motions for continuance, or for a new trial, or for amendments to the pleadings in the case may be made in the absence of the accused.**** The record of the trial must show on its face that the accused was present in person.*****

Sec. 1767. THE RIGHT TO BE REPRESENTED BY COUNSEL.—This right did not exist at the common law in the case of trials for felony, while it did exist as to trials for misdemeanors. The court was supposed to represent the accused in felonies, and see that he had a fair trial. But now the right to be defended by counsel is guaranteed by every state to the accused, and in felonies as well as misdemeanors.

If the accused is unable to employ counsel, the court will appoint or assign counsel to defend him. The court has the right to make the selection of counsel in such cases, but in some jurisdictions consults the accused as to his wishes in the matter. Unless the statute provides for compensation, counsel appointed

*67 Ill. 278; 16 R. I. 401.
**56 Ark. 4.
***2 C. & P. 413. Contra, 20 S. W. Rep. 217.
****45 Kan. 492; 121 Mass. 371.
*****6 Pa. St. 385.

by the court must serve without compensation.* Defendant may decline counsel and defend himself.**

Sec. 1768. THE RIGHT TO BE CONFRONTED BY THE WITNESSES AGAINST HIM.—One of the most substantial rights secured to the accused is that of meeting the witnesses against him face to face. The refusal to recognize this right resulted in the disgraceful "Star Chamber" trials in England, where the trial was held in secret and the accused knew nothing of it until it was over. So, at the common law, the right was frequently denied, but is now guaranteed by the constitution of the United States to persons accused in the federal courts, and by the state constitutions to those tried in the state courts.

The right does not extend to the preliminary investigation before a coroner, grand jury, or magistrate to ascertain if one should be held to answer for a crime.***

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*In those States where compensation is provided by statute to be paid by the County to those appointed to defend persons unable to employ counsel, a reprehensible practice has grown up, of having some friend of the prosecutor appointed, who advises the accused to plead guilty, and having obtained the consent of the accused to such a proceeding, makes a few remarks to the court, allows the accused to be sentenced and turns in his bill to the County for services rendered in assisting to railroad the accused to prison. It is needless to observe how this practice instead of assisting the accused, serves, in many cases, to effect his undoing.

**130 Ind. 265; 86 Wis. 474.

***3 Greenleaf on Evidence, Sec. 11. In case a witness who testified in such preliminary examination should die before the

The accused may waive this right, and he may consent to admission of secondary evidence.* So the testimony of a deceased witness given on a former trial may be read in evidence, as it is considered that the accused has once met his accuser face to face.** But depositions of witnesses in criminal cases cannot be taken without the consent of the accused. But this does not apply to documentary evidence, certified copies of such evidence may be admitted.***

Many states require that the names of the witnesses for the state or people against the accused must be endorsed on the indictment. But this requirement is not general. The purpose of such a requirement is to acquaint the accused with the witnesses against him, that he may be prepared to impeach them.****

The right to be confronted with the witnesses against him, requires the state to call all the witnesses to a criminal act, even though they be favorable to the accused, if they are available. But the rule does not require the calling of an unreasonable number of witnesses to the same overt act.*****

Sec. 1769. THE ACCUSED CANNOT BE REQUIRED TO BE A WITNESS AGAINST HIM-

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trial, his testimony might be admitted at the trial as good secondary evidence.

*29 Iowa, 133; 21 N. W. Rep. 61.

**73 Pa. St. 325.

***48 Mich. 54; 24 Mich. 225.

****58 Mich. 321; 48 Mich. 482. In some States this law is held directory merely, and in others it does not exist at all.

*****37 Mich. 4.

SELF.—The defendant as a witness cannot be required to criminate himself in any civil or criminal proceeding. This is generally regarded as a constitutional right in all of the states. When a person is called to testify in a civil or criminal case, and he is questioned as regards any matter where his testimony might tend to criminate him he may decline to answer. The court decides whether it will tend to incriminate him.* One turning state's evidence, waives the right, and must testify fully.**

At the common law the accused could not testify in his own behalf This was modified later so that the accused could make a statement but could not be sworn as a witness. But now the accused may be sworn if he wishes, but he cannot be called upon to testify against himself.

The accused may make a statement, which the jury will give such credence as they see fit, or he may be called as a witness and give his testimony on oath.*** When he offers himself as a witness he is subject to the ordinary rules of cross-examination. This is not the case when he simply makes a statement. The jury are not allowed to draw unfavorable inferences from his failure to testify. And by statute the prosecutor may not comment upon his failure so to do.

Sec. 1770. OF THE RIGHT TO HAVE HIS GUILT ESTABLISHED BEYOND A REASON-

*40 Mich. 710; 2 Mich. 340.
**106 N. H. 540; 1 Greenleaf on Evidence, 451.
***50 N. Y. 240; 55 Me. 200.

ABLE DOUBT.—The effect of a conviction in a criminal case is too drastic to permit of making mistakes, and it is therefore a rule of law in all civilized countries that the guilt of the accused must be established beyond a reasonable doubt. Which is quite different from the rule applicable to civil cases, where the decision goes to the side having a fair preponderance of the evidence.

Reasonable doubt is explained to be a fair doubt growing out of the testimony in the case. It is a doubt based on reason and common sense, and is not a mere capricious or possible doubt.* This question is left to the reason of each individual juror, so that if one juror in the twelve entertains a reasonable doubt it should lead to acquittal or disagreement. Again, to establish guilt beyond a reasonable doubt, the circumstances proved must be inconsistent with any other theory than guilt, and if the jury can reconcile the facts with any theory of innocence, they must acquit the accused.**

Sec. 1771. OF THE RIGHT TO A SPEEDY AND FAIR TRIAL.—By the constitution of most states, the accused is guaranteed a speedy trial and a fair trial.

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*"It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge." Per Shaw J. Trial of Webster; 26 N. J. Law, 601; 6 Nev. 340; 38 Mich. 482.

**39 Mich. 717; 64 Mich. 148; 23 Ind. 170.

A speedy trial is said to mean simply that the trial shall take place as soon as possible after the indictment is found without depriving the prosecution of a reasonable time for preparation.*

As to what constitutes a fair trial is to be determined from the course of the proceedings, and involves matters pertaining to evidence and procedure. Thus:

1. The trial judge should not give an opinion on the evidence in the presence of the jury. The jury should be allowed to draw their conclusions from the evidence submitted to them, and without the opinion or comment of the trial judge. The court is not permitted in any way to prejudice the jury for or against a witness or the accused. In the English and Canadian courts and perhaps in some of the states, the trial judge does comment on the evidence to the jury, but this seems out of place if the jury is to be the judge of the facts.

2. The prosecuting attorney must not in his opening statement allege things for which he has no proof, or which would not be competent to show in the case. So the prosecutor is not allowed to abuse or mislead the witnesses.** Or make assertions that he believes the defendant guilty, aside from the evidence in the case; and in general the prosecutor must keep within reasonable bounds.***

3. The court should exclude all witnesses from the

*Clark on Crim. Procedure, Sec. 143; 8 Okla. 1.
**59 Mich. 576; 51 Mich. 612.
***64 Mich. 706; 58 Mich. 324.

court room while they are not testifying if the defendant so desires. But this is usually within the discretion of the trial judge, and if not abused will not constitute an unfair trial.*

4. The order of proof is within the discretion of the trial judge. But evidence of a collateral issue should not be admitted until the *corpus delicti* has first been established.** The discretion of the trial court as to the order of introducing proof will not be disturbed unless what was done was prejudicial to the accused.

Sec. 1772. OF THE BURDEN OF PROOF IN CRIMINAL CASES.—The decisions are not harmonious on the subject of burden of proof. As a general rule the burden of proof is on the prosecution at all times.***

Capacity to commit crime is generally presumed, but evidence having been offered showing incapacity, or tending to show it, puts the burden on the prosecution of showing capacity beyond a reasonable doubt. The rule as to the burden of proof in case the accused is alleged to be insane is not uniform. By some authorities the burden is on the prosecution, and by others on the accused to show insanity.

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*48 Mich. 482; 67 Mich. 437.

**51 Mich. 67.

***17 Mich. 9; Greenleaf on Evidence, Sec. 74. By some authorities the burden of proof is said to be on the prosecution until a certain point is reached and then shift, but this is not generally maintained.

Proof beyond a reasonable doubt is not required in a civil case, even though a criminal charge be in issue. Thus on a charge of libel on the ground of accusing the party of having committed a crime, if the defendant in the libel case seeks to justify by showing that the party did commit the crime, by some authorities all he need to do is to establish the fact by a fair preponderance of the evidence.* While others hold that the same degree of proof is required as in a criminal proceeding, that is, proof beyond a reasonable doubt.**

Evidence of other crimes is inadmissible to establish the crime at issue, except in the following cases:

1. Another crime may be shown if it was part of the *res gestae* (same transaction) of the crime charged. Or if it show a preparation for the crime charged. Or if it rebuts the defence of mistake.***

And evidence tending to prove the crime charged cannot be excluded because it tends to prove another crime. The general rule is that evidence of one crime will not be admissible to convict the accused of another, yet if the evidence offered connects the accused with the crime charged it is admissible.

Sec. 1773. IDENTIFICATION OF THE ACCUSED.—It is held in reference to the identification of the accused by peculiar marks or otherwise:

1. That the accused cannot be required to exhibit himself for purposes of identification in any unusual

*51 Mich. 11.
**71 N. Y. 142; 16 Wend. 601.
***150 U. S. 57; 147 Ill. 444; 105 Mass. 468; 80 N. Y. 373.

way. This follows from the rule protecting the accused from giving evidence against himself.*

The prosecution is prohibited from exhibiting evidence obtained by compulsory examination before trial.**

By some authorities the constitutional provision protecting the accused from incriminating himself is held not to apply to evidence of physical facts in controversy, and that he may be compelled to exhibit parts

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*50 N. C. 559; 67 Ga. 76; 107 Mass. 81. In the last case certain foot-prints had been discovered in connection with a crime, and it was desired to have the accused put his feet in a pail of sand, that they could compare the foot-prints. The Supreme Court held that it was error to so compel one to exhibit his person in an unusual way. In a New York case it was held not to be error to compel the defendant to stand up for identification. 144 N. Y. 119.

**63 Ga. 667; 61 Mich. 612. In the Georgia case, when the defendant was arrested, and before trial, his feet were forced into a pan of wet sand, and the foot-prints offered in evidence at the trial. The Supreme Court held that this was error.

In this connection it may be noticed that the so-called zeal of police officers and public prosecutors to convict an accused person of crime, often carries them beyond the bounds of justice and fair dealing. We read the State Trials in England and blush for shame that the wiseacres of the law, usually discreet and just men, should be carried away by their passions and prejudices when it came to the trial of a helpless fellow mortal for crime. But what shall we say of the police officers and prosecutors of the present day who for no better reason than notoriety and the desire to make a record and perhaps secure personal preferment, seek by any means fair or foul to compel a conviction, regardless of the question of guilt.

of his person for identification.* Perhaps the wording of the constitution affects the question somewhat. Thus, if the constitution prohibits the requiring of the accused to give evidence, it would be broader than if it only requires that he shall not give testimony. But such a distinction leads to a denial of the theory of the protection offered the accused, and is made perhaps as an attempt to justify an erroneous decision.

Sec. 1774. THE CHARACTER OF THE ACCUSED AS A DEFENCE.—The character of the accused is of more or less importance in establishing his guilt or innocence. Character involves what a man really is, while reputation refers to what he is reputed to be.

The character of the accused, in any case, is presumed to be good, and he may rest on this presumption. The state may not introduce evidence of his bad character unless the defendant first puts his character in issue by introducing evidence in regard thereto.**

The court should charge the jury as to the consideration to be given good character.

The character of other persons is not generally in issue except in cases of homicide the bad character of

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*52 Miss. 207; 32 Am. Rep. 595. In England there is no constitutional provision protecting the accused, and the accused may be compelled to exhibit his person for the purpose of identification. 6 Cox Cr. Cases, 333.

The accused may waive the right to refuse to exhibit his person if he wishes. 50 Mich. 228.

**Greenleaf on Evidence, Sec. 35.

the deceased may be shown in aid of a plea of self-defence.*

Sec. 1775. DYING DECLARATIONS AS EVIDENCE.—A declaration made in extremis by a person who has met death at the hands of another is called a dying declaration, and may be used against the accused if it is first shown that the person making it was in extremis, or about to die. The consciousness of approaching death is deemed to make such a statement or declaration of the same validity as a sworn statement. Such a dying declaration is only admissible when it refers to the cause of death. Such a declaration need not be reduced to writing or sworn to, but this may be done.

Sec. 1776. JURISDICTION OF STATE OR NATION OVER CRIMES—Crime, in its larger sense, is considered as an offence against the sovereignty of the state, and the state only assumes to punish such offences as are committed within its jurisdiction. In fact no nation has the power of insisting upon the observance of its laws outside of its territorial limits. State laws, likewise, are of no validity outside the boundaries of the state.**

The territorial limits of the United States by land, as between it and the nations adjoining, are fixed by treaty. The water limits are fixed by rules of inter-

*Clark's Crim. Procedure, 537. The reputation of witnesses may be shown to impeach their credibility.

**8 Mich. 342.

national law. The rules of international law are not enforced by any determinate authority, yet they have considerable effect in keeping the various nations within bounds. The high seas are recognized as the common property of all nations. The ocean boundary of a nation, within which it has exclusive jurisdiction, is as far from the shore as a cannon ball can be fired, estimated at a marine league, or about three miles. This was formerly as far as a cannon ball could be fired, and the rule has not changed with modern improvements in gunnery. An island within this limit is considered as part of the mainland, and is within the jurisdiction of the state owning the shore line.

Bays are regarded as within the jurisdiction of the nation owning the shores, even though the width exceeds six miles.*

A public or private ship on the high seas is a part of the nation owning it, and an offence committed on it is an offence against the sovereignty of that nation.

A nation may punish its citizens for offences committed in a foreign country; and perhaps a state may punish its citizens for offences committed in a sister state.** But this is disputed.***

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*1 Kent. Com. 29; 9 Md. 28.

**16 Wis. 398; 13 Tex. App. 289.

***27 N. J. Law, 499; where it is held that a man cannot be tried in the State simply because his victim died there, the crime having been committed in another State, and this notwithstanding the statutes provided that he could be so tried.

A crime may be an offence against two sovereignties and may be punished by either or both.*

Sec. 1777. THE LOCUS OF THE CRIME.—By the locus of a crime is meant the place where it is committed. This becomes important, as the offender must be tried by a jury of the county where the crime was committed.

In determining the locus of a crime, the place where the public is injured governs. Thus if a man shoots from one state across the line into another, and there kills another, the place where the man is injured is the locus of the crime, and where the offender may be punished. In such a case the offender would not be a fugitive from justice until he came into the state where the injury was done and then departed from it, as to be a fugitive from justice he must have departed from the state in which the crime was committed.**

Where an assault is made and injury received in one state, and death follows in another state, the locus of the crime is in question. This question is covered in nearly every state by statutes which provide that the offender may be punished in the state, for offenses committed without the state, where death results as a consequence, and the victim dies within the state.***

*14 How. 20.

**101 Mass. 1.

***101 Mass. 1; 8 Mich. 420. In the last case such a statute was held unconstitutional. It would seem that the legislature would have no power to punish as criminal an act committed outside of its territorial limits. The fact that the

punishment of felonious homicide is not the same in the various States is another objection to such statutes, as it would put it in the power of the injured party to go from a State where capital punishment is not inflicted to one where it was that the offender might be more severely punished.

CHAPTER V.

OF THE PRINCIPLES OF CRIMINAL PLEADING.

Sec. 1778. ACTIONS ARE EITHER CRIMINAL OR CIVIL.—Actions at common law are divided into two general classes: 1. Criminal, or such as concern pleas of the crown, and 2. Civil, or such as concern common pleas. And the same system of pleading is applicable to both civil and criminal cases. The only distinction arises from the fact that the criminal actions must be more strictly correct and advantage may be taken of nicer and more technical objections.*

Sec. 1779. NECESSITY OF CRIMINAL ACTIONS.—An action is as necessary to punish crime as to recover a judgment in a civil suit. By Magna Charta it was declared that no person shall be taken or imprisoned but by the lawful judgment of his peers, or the law of the land, and this provision which was early construed to mean that no person could be punished "without process of law, that is, by indictment or presentment of good and lawful men,"** has been carried into the constitution of the United States and of the several states. So that no person can be taken

*11 Q. B. 810.

**2 Inst. 50. Due process of law means law in its regular course of administration, through courts of justice. 2 Kent Com. 13.

or imprisoned except by the law of the land—*due process of law*—which includes prosecution by indictment and trial by jury for all the higher crimes and offences.*

Sec. 1780. HOW A CRIMINAL ACTION IS COMMENCED.—An accused person must be put on trial on some regular and established form of accusation. What that must be depends upon the local law. In many of the states there must be an indictment by a grand jury, while in others an information filed by the public prosecutor is allowed to be substituted. But prosecution by indictment is the most usual and constitutional course for bringing offenders to justice on criminal charges. The court has the right to, and does exercise a supervision over the proceedings of the public prosecutor, to see that his authority is not exercised unjustly and oppressively.**

Sec. 1781. AN INDICTMENT DEFINED AND EXPLAINED.—An *indictment* is a written accusation at the suit of the government, found and presented on oath by a grand jury duly constituted and sworn, charging one or more persons with the commission of a crime.***

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*8 Gray, 329; 37 Me. 172.

**Heard Crim. Pl. 28; 2 Story, Const. Sec. 1949.

***"An indictment is nothing else but a plain, brief, and certain narrative of an offence committed by any person, and of those necessary circumstances that concur to ascertain the fact and its nature." 2 Hale, Pleas of the Crown, 169.

The first principles of law require that the charge should

The essentials of a good indictment are described in the twelfth article of the Declaration of Rights, "No subject shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally, described to him."*

A *criminal information* is a criminal cause or matter; it only differs in mere form from an indictment; instead of the jurors presenting a bill the King's coroner, or the public prosecutor, prefers the information, but otherwise the one is as much a criminal matter as the other, and they are of like effect.

The term *complaint* is a technical one, descriptive of the criminal proceedings before magistrates. The same rules are in effect applicable alike to indictments, informations and complaints.**

The form of an indictment is governed largely by precedent, and it is always advisable to follow the usual and customary forms in the preparation of an indictment or criminal information.*** The indictment from

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be so preferred as to enable the court to see that the facts amount to a violation of the law and the prisoner to understand what facts he is to answer or disprove." Forsyth Const. Law, 458.

*8 Gray, 342.

**11 Pick. 436; 2 Allen, 502. But the magistrate has no right to pass upon informalities and quash a complaint on such grounds which is not within his jurisdiction to try, his duty in such cases being merely to examine into the grounds of the complaint to decide whether the party shall be bailed, committed, or discharged. 3 Cush. 525; 4 Mass. 462; 16 Pick. 211.

***3 B. & Ald. 507; 9 Gray, 291; 3 Denio, 245; 12 Wheat. 474.

the earliest times has been required to state every material allegation with precise and sufficient certainty. And though the reason for the rule has in some cases been lost, yet the rule remains and is to be observed.

An indictment being a precise and formal instrument, should have no erasures, interlineations, or abbreviations.* No part of the indictment should be in figures; numbers, dates, etc., should be written out at length. So no part of an indictment should be written with a pencil.** At common law the indictment had to be engrossed on parchment.***

In construing an indictment as well as allegations in a civil pleading, the rule is: "Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."****

Sec. 1782. OF THE PARTS OF AN INDICTMENT—THE VENUE — COMMENCEMENT—AVERMENTS.—The *venue* in an indictment indicates the place of trial, which at the common law, was always the county in which the offence was committed. The venue, or county, or other designation of the place showing the limits of the jurisdiction of the court,

*7 C. & P. 319; 16 Gray, 16; 9 Gray, 114; 97 Mass. 598.
**14 Ohio, 461; 13 Met. 538.
***7 C. & P. 429; 2 Russell on Crimes, 812.
****14 Gray, 39; Gen. Sts. of Mass. Ch. 3, Sec. 7, cl. 1.

was stated in the margin of the indictment, thus: "Middlesex, to wit." It was never necessary to insert the county in the margin if it was inserted in the body of the caption or commencement, but it must be in one or the other.*

The *commencement* of an indictment is in effect as follows: "Middlesex, to wit: The jurors for the commonwealth (or state), upon their oath present, that" etc., continuing to state the offence for which the person is indicted. If any of the jurors affirm instead of taking an oath, the commencement will run "upon their oath and affirmation."**

The commencement of a second or subsequent count in an indictment is as follows: "And the jurors aforesaid upon their oath aforesaid do further present that" etc.

Averments in the indictment are usually introduced in the first instance with the words, "The jurors, etc., upon their oath present that" etc., following with the

*5 Gray, 480; 1 Saund. 308.

**Heard Crim. Pl. 42; 7 Gray, 492.

The formal commencement of an indictment may be as follows:

"The State of Ohio, Ashtabula County, ss

The Court of Common Pleas, Ashtabula County, Ohio, of the term of January, in the year of our Lord one thousand nine hundred and six.

The jurors of the grand jury of the State of Ohio, impaneled, sworn, and charged to inquire of offences committed within the said county of Ashtabula, in the name and by the authority of the State of Ohio, on their oaths and affirmations do present and find that" etc.

first averment. Subsequent averments may be commenced, "And the jurors aforesaid upon their oath aforesaid do further present that," etc.; or if the second averment is connected with the first it may be introduced by simply saying: "And that" etc., stating the averment. But it is held that the word "whilst" will not carry an averment with it, it not being positive enough.*

Sec. 1783. OF THE NAME AND ADDITION OF THE DEFENDANT.—The defendant must be described by his Christian name and surname, or by the name or names by which he is most commonly known. In case of doubt as to his name he may be variously described under alius dictus. This is done by ading one name after the other in cases of doubt, thus: "C. D. otherwise called E. F." The word "junior" is no part of the name, but where a father and son of the same name are indicted together some distinction as "elder" or "junior" should be used to distinguish one from the other.**

A woman may be described as a single woman, spinster, or widow, or as the wife of a person described by his name and addition. The inhabitants of a town, county, city or district may be indicted in their corporate name. So a corporation is indicted in its corporate name.***

*8 Q. B. 959.
**14 Barb. 261; 10 Mass. 203; 7 C. & P. 264.
***16 Mass. 141; 28 Vt. 583; 3 Q. B. 223.

If a party is indicted with *respect* to his office it is sufficient to state that he is such officer.* And if the name of a prisoner is unknown he may be indicted as a person whose name is to the jurors unknown, but who is personally brought before the jurors by the keeper of the prison, but there must be some thing to indicate whom the grand jury meant to designate.**

Any mistake in the name of the defendant can only be taken advantage of by the defendant by a plea in abatement, in which he has to set out his right name, and if he pleads over no advantage can be taken of the error after verdict. If the plea in abatement is allowed a new complaint in his right name may be immediately preferred.

In 1413 the Statute of Additions (1 Hen. V. Ch. 5) was passed requiring that the defendants in indictments be given their *additions* as to "estate or degree or mystery," and also the towns or hamlets or places from which they came. The *estate* or *degree* meant the defendant's rank or life, while his *mystery* meant his trade, art or occupation. In some of the states this statute is followed, and in others the Statute of Additions has been repealed.

The name of the defendant needs no proof unless a misnomer is pleaded in abatement, in which case the issue is as to his name, and the burden is on the defendant to show that he is commonly or uniformly

*2 Hawkins, Pl. of the Crown, Ch. 25, Sec. 112.
**6 Gray, 489.

known by another name than that stated in the indictment.*

Sec. 1784. OF THE NAMES OF PERSONS OTHER THAN THE DEFENDANT MENTIONED IN THE INDICTMENT.—The Christian name and surname of any person whose description is involved in the averment of the offence must be fully and accurately stated. But all the law requires in this regard is certainty to a common intent; there must be no repugnancy or absurdity. A party need not be described by his right name, provided he is described by a name he has assumed or by which he is generally known. So if the name used be *idem sonans* (of the same sound) with that of the person the variance will be immaterial. That is, if the names may be sounded alike, without doing violence to the power of the letters found in the variant orthography, then the variance is immaterial.**

The question whether one name is *idem sonans* with another, when it arises in evidence on the general issue, is for the jury and not for the court. When it arises on demurrer to a plea in abatement, it is for the court.***

The following rules are laid down by Heard in his work on Criminal Pleading as to this subject:

"1. It is not necessary to describe a party by what is, in strictness, his right name; but it will be suffi-

*11 Gray, 320; 3 Greenl. Ev. Sec. 22.

**121 Mass. 369; 28 Ala. 60; 14 Gray, 400; 121 Mass. 47.

***121 Mass. 47; 13 Allen, 571; 103 Mass. 421; 21 Mo. 498.

cient to state any name he has assumed, or by which he is generally known.

"2. If the name of the injured party cannot be proved, it will suffice to describe him as a person 'whose name is to the jurors unknown.'

"3. An illegitimate child is not entitled to the surname either of the mother or of the putative father, but can acquire a surname by reputation.

"4. If a parent and child bear the same name, it will suffice in an indictment to describe the latter by that name without the addition of 'junior.'

"5. If a parent and child both bear the same Christian name and surname, and this name occur in an instrument without any addition of 'senior' or 'junior,' it will be presumed, in the absence of evidence to the contrary, that the parent was intended."*

Sec. 1785. IT IS NECESSARY TO ALLEGE TIME WITH PRECISION IN AN INDICTMENT, STATING A CERTAIN YEAR AND DAY FOR ALL MATERIAL FACTS.—The law has always required a specification of time and place as to every material fact in the indictment constituting the offence. Any failure, uncertainty or incongruity in these respects is fatal to the indictment. The indictment to be good must show a certain day and year on which the issuable facts occurred, and if the day of the month alone is stated without the year it is bad.**

*Heard Crim. Pl. 60.

**34 Me. 52; 11 Cush. 600; 19 Ala. 526; 2 Hawkins Pl. of the Crown, Ch. 25, Sec. 77.

The time stated in the indictment must be before the action brought, and if this is so it is not material if it does not correspond with the true date of the offence." The day laid in the indictment is 'circumstance and form only, and not material in point of proof."* This is said to be a general rule applicable alike to civil and criminal pleadings, so that the jury are not required to find that the offence was committed on the exact day alleged in the indictment, but may find that the crime was committed either before or after that day, so long as it is not found to have been since the finding of the indictment, for the question is not *when* the act was done, but whether it was done or not.**

It is not necessary to allege the *hour* at which the offence was committed, unless rendered essential by the statute on which the indictment is drawn, as where the statute makes it an offence to do certain things after certain hours. But in burglary it is usual to state some particular hour of the night in which the burglary was committed, as the meaning of the word "night-time" in burglary is not strictly in accordance with the popular meaning of that word.***

When the offence is a continuing one, it is alleged with a continuando, by stating it to have been committed on a day certain, and divers other days between said day certain and another day certain, both of which

*Spicer v. Matthews, Fortescue, 375.

**12 Howell State Trials, 1398; 3 Inst. 230; 26 Ala. 154; 110 Mass. 103; 10 Mo. 291 49 N. H. 81.

***10 N. H. 105.

days are to be given. Without this continuando, the offence is sufficiently alleged to have been committed on the day certain, but not as to the divers other days.*

When the offence is cumulative and is alleged to have been committed on a day named and divers other days between that day and a subsequent day named, it is said that time enters into the essence of the offence, and limits the offence to the precise period stated in the indictment. The evidence must be limited to that time, and evidence of acts before or after the time are incompetent.**

An indictment is sufficient if the year of the commission of the offence is stated by reference to the caption.*** But an allegation that the offence was committed "on the tenth day of September now past," was held insufficient, as all Septembers in the past may be so classed.**** Omitting the words "the year of our Lord," when the word year is used in connection with the date as "in the year eighteen hundred and fifty-seven," does not invalidate the indictment.*****

When by statute or in order to constitute a particular offence, a prosecution is to be commenced, or an act shown to be done within a limited time, an express averment is unnecessary, if it appear from the time

*12 Gray, 326; 8 Met. 527; 10 Mod. 335; 115 Mass. 141; 107 Mass. 212.

**13 Pick. 364; 99 Mass. 500; 125 Mass. 214.

***5 S. & R. 315; 4 Gray, 2.

****3 Cush. 523.

*****3 Kelly, 18; 2 Ind. 91; 14 Gray, 97.

stated that the prosecution was commenced or the act done within the prescribed limit.*

Sec. 1786. THE INDICTMENT TO BE GOOD MUST ALLEGE THE PLACE WHERE THE CRIME WAS COMMITTED.—The indictment must expressly show the place of the commission of the offence, and this must appear to be within the jurisdiction of the court in which the indictment is taken, and must be alleged in such a manner as to be free from all repugnance and inconsistency.** The purpose of stating the place is to show that the grand jury has jurisdiction to find an indictment, and also that the traverse jury may be drawn from the proper county to try the case.

Time and place are usually pleaded thus: "That C. D. of Etc., on the first day of June, in the year of our Lord ——, at B., in the county of S.," or "in the county aforesaid," referring to the county in the venue or commencement; unless another county has been mentioned before, in which case "aforesaid" could not be used as it would create an uncertainty.***

In all cases where the crime is not of a local nature, all that is necessary is to allege that the offence was committed in the county, and prove that it was committed at any place within the county, though charged

*Heard Cr. Pl. 73.

**2 Hawkins Pl. of the Crown, Ch. 25, Sec. 83; 5 Q. B. 34; 13 Pick. 359; 12 Met. 9; 7 Mass. 9.

***Heard Cr. Pl. 76.

to have been committed within a particular town.* But if the offence is of a local character, the proof respecting the place must correspond with the allegation. That is, if the place is material, the place stated as venue is to be taken as the true place. Thus an indictment for an affray must show that the offence was committed in a public street or highway.** So if the place is stated as matter of local description, and not as venue, it is necessary to prove it as alleged, though it need not have been stated.***

Sec. 1787. BY THE USE OF THE WORDS "THEN AND THERE" IN THE SUBSEQUENT CLAUSES OF AN INDICTMENT THE EFFECT IS TO REPEAT THE DAY AND YEAR, TOWN AND COUNTY, PREVIOUSLY STATED.—As all material facts issuable and triable are required to be stated with certainty as to time and place, it would require the stating of these at length in each averment if some shorter process had not developed. But where the facts in the various averments are supposed to have occurred at the same time, it is held sufficient, as to all acts after the first, to allege time and place by the words "then and there" (*adtunc et ibidem*), thus referring to the time and place mentioned for the first act, and not to repeat the day and year town and county, or the expression "on the day

*6 Gray, 488; 21 Pick. 509; 32 Ind. 55; 24 Mo. 361; 13 Ga. 396.

**Heard Cr. Pl. 77, 79.

***8 Iowa, 523; 12 Ohio St. 387.

and year aforesaid at B. aforesaid in the county aforesaid."*

The mere conjunction "and" without adding "then and there," will in many cases be insufficient.** So the word "instantly" is held not to be equivalent to the word "then" in order to make the indictment sufficient.***

If two distinct times and places have been mentioned in the indictment, and reference is afterwards made to time and place by the words "then and there" the allegation will be insufficient for uncertainty.****

Although the allegation of a specific time and place is required for each material fact, it is a rule but with some exceptions, that time and place need not be laid according to the truth, as if the time is shown to be previous to the finding of the indictment, and within the time limited for preferring it, and the place in the county, or other extent of the court's jurisdiction, a variance between the indictment and the evidence as to the time when and the place where the offence was committed is not material.

The exceptions to this rule as given by Heard, are:

1. The dates of bills of exchange and other written instruments must be truly stated when necessarily set out.

2. Deeds must be pleaded either according to the

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*2 Hale, P. C. 180; 7 Vt. 219.

**Heard Cr. Pl. 84.

***3 Per. & Dav. 52.

****24 Mo. 358; 39 Me. 291; 20 Mo. 411.

date they bear, or to the day on which they were delivered.

3. If any time stated in the indictment is to be proved by matter of record, it must be truly stated.

4. If the statute upon which the indictment is founded give the penalty to the town in which the offence was committed, the name of the town must be truly stated.

5. If the precise date of a fact be a necessary ingredient in the offence, it must be truly stated.

6. Where a place named is part of the description of a written instrument, or is to be proved by matter of record, it must be truly stated.

7. If the place where the fact occurred be a necessary ingredient in the offence, it must be truly stated.*

Sec. 1788. THE FACTS AND CIRCUMSTANCES CONSTITUTING THE OFFENCE MUST BE STATED WITH CERTAINTY.—It was a rule of the common law that no one shall be held to answer to an indictment or information, unless the crime with which it is intended to charge him is expressed with reasonable precision, directness, and fulness, that the accused may be informed as to what he has to meet, is recognized and enforced in all jurisdictions. By the sixth Amendment to the Constitution of the United States, it is provided "In all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation."

*Heard Crim. Pl. 92.

And this constitutional provision is construed to mean that the indictment must set forth the offence with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged.* This provision in other constitutions provides, that the accused shall not "be held to answer for any crimes or offences, until the same are fully and plainly, substantially and formally, described to him."**

Every pleading, civil or criminal, must contain allegations of the existence of all the facts necessary to support the charge or defence set up by it. An indictment should, therefore, contain an allegation of every fact necessary to constitute the criminal charge preferred by it. So where criminal intent is necessary, as it usually is, it must be alleged; and all acts necessary to the crime must be alleged. The criminal mind is usually alleged by the preliminary assertion that the defendant did the acts complained of "fraudulently," "falsely," "unlawfully," or "feloniously," and this is the purpose of such words.***

It is a rule with regard to pleading that "where an averment, which is necessary for the support of the pleading, is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the court after verdict that the verdict could not

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*7 Pet. 142.

**16 Pick. 213; 4 Gray, 32; 97 Mass. 573. The fact that the accused cannot have a new trial on the ground of surprise as in civil cases, is given as one reason for requiring particularity and certainty in the indictment.

***Heard Cr. Pl. 94, 95.

have been found on this issue, without proof of this averment, then, after verdict, the *defective averment* which might have been bad on demurrer, is cured by the *verdict.*"* Another rule in this connection is, that in considering an indictment on a writ of error, after verdict, it is not for the court to inquire as to what facts were proven at the trial, but to ascertain if the indictment could be supported by proof of the facts accurately alleged, and proof that those inaccurately alleged are to be taken adversely to the defendant; if so, the indictment is sufficient. If the facts so proved would not support the charge, the indictment is bad on error. So an indictment to be good must show that the offence has been committed, as well as how it was committed.**

Where the offence consists of words written or spoken, such words must be stated in the indictment, or it will be defective on demurrer, in arrest of judgment, or on error.*** So an indictment must contain a certain description of the crime and precise and technical allegations of the facts and circumstances which constitute it, without inconsistency or repugnancy, so as to identify the accusation, that the defendant may be tried in a court of appellate jurisdiction for one and the same offence as in a court of the first instance, and lest the grand jury should find an indictment for one

*L. R. 8 Q. B. 102.
**2 Q. B. D. 58; 3 Q. B. D. 615.
***3 Q. B. D. 607.

offence and the defendant put on trial for another without any authority.*

It is the general theory and purpose of an indictment that every offence consists of certain acts or circumstances committed or omitted under certain circumstances. The criminal nature of an offence is a conclusion of law from the facts and circumstances of the case. The indictment, therefore, should set out precisely all the facts and circumstances which render the defendant guilty of the offence charged, otherwise the law resulting from the facts would be a question for the jury.**

Each count in an indictment ought to charge one single crime, that the court may apportion the fine or punishment to it according to the grade of the offence.

While the rules generally laid down as regards certainty may vary in relation to different crimes to some extent, a different degree of particularity being required as to some offences, so that where a crime cannot be stated with complete certainty, it is sufficient to state it with such certainty as the circumstances will permit.*** The general rule is that certainty to a certain intent in general is all that is required. This sort of certainty is construed to mean, "what upon a fair and reasonable construction may be called certain, without recurring to possible facts, which do not ap-

*4 Gray, 31; 14 Gray, 81; 109 Mass. 352.
**Heard Crim. Pl. 102; 4 Q. B. 783; 19 Pick. 307.
***5 Cush. 295; 112 Mass. 292.

pear."* That which is apparent to the court by necessary collection out of the record need not be averred.

In criminal pleading, in some cases, an act may be stated either according to the fact, or according to its legal effect or operation. Thus it is sufficient if it is alleged that a person did an act, to show that it was done by another acting as his agent, without alleging this fact.**

Sec. 1789. MEANING OF "INDUCEMENT" IN AN INDICTMENT, AND HOW IT SHOULD BE ALLEGED.—The *inducement* is that part of a declaration or indictment which contains a statement of the facts out of which the charge arises, or which are necessary or usual to make the charge intelligible. That is, it includes all the allegations which do not involve the special charge alleged against the defendant. This inducement may be at the beginning or end of the declaration or indictment, or interwoven, by way of parenthesis, with the charge itself.***

The office of an inducement is explanatory, and in general it is not required to be set forth with exact certainty. The allegations of fact constituting the offence should be set out with particularity and certainty, but those averred by way of inducement, may be alleged more generally and with less certainty.****

*Heard Cr. Pl. 105; 1 Dougl. 159.
**3 Conn. 1; 7 Pick. 279; 26 Ala. 108.
***12 M. & W. 534.
****9 Wall 482; 14 Pick. 165; 14 Gray, 90.

Sec. 1790. ARGUMENTATIVENESS IS A DEFECT IN AN INDICTMENT.—An indictment will not be supported by connecting together its different parts, so as to eke out an essential allegation arugumentatively and by inference.* The matter constituting the indictment ought to be full, express, and certain, and not be maintained by argument or implication.**

But allegations may be aided by implication, and an implication may, in some cases, supply the omission of a direct averment. Thus an allegation that the accused assisted a criminal to escape, where this is made an offence by statute, is sufficient without alleging that the criminal attempted to escape.***

Sec. 1791. AN INDICTMENT CHARGING A PARTY DISJUNCTIVELY IS VOID.—When an allegation of fact in an indictment is alleged *disjunctively* or *alternatively* it is void, as no specific charge is made. Thus if an indictment state that the defendant "murdered *or* caused to be murdered," these are two distinct crimes, and the allegation is bad because it is uncertain whether the defendant is charged as a principal or accessory before the fact.**** So an indictment alleging a sale of "spirituous *or* intoxicating liquor" is bad for uncertainty.*****

But when the word "or" is used in a statute in the

*1 Allen, 594; 1 Leach C. C. 534.
**4 Rep. 44b; 5 Gray, 85.
***17 Q. B. 325.
****Heard Crim. Pl. 119.
*****2 Gray, 501.

sense of "to wit," that is, in explanation of what precedes, and making it signify the same thing, a complaint or indictment which adopts the words of the statute is well framed. Thus, "ten counterfeit bank-bills *or* promissory notes" is good.*

Sec. 1792. THE RULE AS TO DUPLICITY APPLIES TO CRIMINAL PLEADING.—Duplicity means double pleading in the sense that several distinct matters are alleged in support of a single demand, any one of which would sufficiently support the demand. The general rule in reference to crimes is, that two or more crimes cannot be joined in the same count in an indictment. But there are exceptions to this rule. Thus if two crimes are of the same nature, and connected, may, or must, constitute but one legal offence, they should be included in one charge. Examples of which are assault and battery, and burglary.** So offences may be alleged cumulatively, and though any one of them would make a good charge, several of them may be charged in the same indictment.*** So a man may be charged in a single count with an assault upon two persons, and be convicted by proof of an assault upon either.**** So matters, however multifarious, that together constitute but one connected proposition or point, will not make a pleading double.*****

*2 Gray, 502; 8 Mass. 59; 4 Mo. 474.
**20 Pick. 356; 105 Mass. 586.
***9 Allen, 269.
****107 Mass. 208; 12 Cush. 615.
*****35 Me. 9.

An objection to an indictment or complaint for duplicity should be taken by motion to quash, demurrer, or motion to compel the prosecutor to confine himself to one charge, and can seldom be effective in arrest of judgment after verdict.*

Sec. 1793. IF ONE MATERIAL PART OF AN INDICTMENT IS REPUGNANT TO ANOTHER, THE WHOLE IS VOID.—It is a general rule of criminal pleading that if one material part of an indictment is repugnant or inconsistent with another material part, the whole is void.** But if the contradictory or repugnant matter is nonsense, and follows a sensible and consistent averment, the latter will not defeat the indictment, but may be rejected as surplusage.***

Sec. 1794. SURPLUSAGE IS TO BE AVOIDED.—As a rule surplusage does not destroy or vitiate an indictment except where it is contrary to the matter preceding. By *surplusage,* in this connection, is meant any unecessary matter, of whatever description. Criminal pleadings should avoid surplusage and pro-

*119 Mass. 195; 44 N. H. 624; 8 N. H. 163.

**2 Hawk. P. C. Ch. 25, Sec. 62.

***5 East, 244; 1 Salk. 324. "The general rule is, it is a fault if a pleading be inconsistent with itself, or repugnant. But there is this exception, that if the second allegation, which creates the repugnancy, is merely superfluous and redundant, so that it may be rejected from the pleading, without materially altering the general sense and effect it shall in that case be rejected as surplusage, especially after verdict." Heard Crim. Pl. 132.

lixity, and make the allegations as brief and terse as certainty of statement will allow. The evil effect of surplusage is that the party who has pleaded with such unnecessary particularity has to sustain an increased burden of proof, and incurs greater danger of failure at the trial. For, unless the allegations are absolutely unnecessary, and can be rejected from consideration without injury to the plea, they must be proved as pleaded, especially if such allegations are descriptive of the identity of some legally essential item in the charge.*

The rule in both civil and criminal cases is, that if the whole of the statement can be stricken out without destroying the accusation and charge in the one case, and the plaintiff's right of action in the other, it is not necessary to prove the particular allegation; but if this cannot be done without getting rid of a part essential to the accusation or cause of action, then, though the averment be more particular than it need have been, the whole must be proved, or the action or indictment cannot be maintained.**

Surplusage is not a ground for demurring to an indictment, the maxim being that *"utile per inutile non vitiatur."* Such immaterial and unnecessary allegation may be rejected as surplusage on trial, motion in arrest of judgment, or on error, if the indictment can

*7 Allen, 571; 10 A. & E. 593; 3 Summer, 15; 12 Mass. 438; 15 Me. 476; 24 Conn. 286.

**Heard Crim. Pl. 135; 7 Allen, 299; 118 Mass. 452.

be supported without them. Of course, such rejection has no effect on the indictment.

Sec. 1795. CONCLUSIONS AND PRESUMPTIONS OF LAW NEED NOT BE STATED; FACTS WITHIN THE KNOWLEDGE OF THE DEFENDANT MAY BE STATED GENERALLY. —In an indictment it is unnecessary, as a general rule, to state conclusions or presumptions of law.* And, if it appear that the facts are more peculiarly within the knowledge of the defendant they may be alleged generally.**

Sec. 1796. ALLEGATIONS OF INTENT AND KNOWLEDGE HOW MADE.—Where any general intent is essential to the offence, it may be alleged generally, in the terms of the definition of the offence that the act was wilfully, maliciously or unlawfully done or omitted, according to the description of the offence. But where by statute, or by the ingredients of the offence, a particular intention is essential to a crime, or a criminal act is attempted but not accomplished, and the evil intent only can be punished, it is necessary to allege the intent with distinctness and precision, and to support the allegation by proof. Where the offence consists in doing an unlawful or criminal act the intention will be presumed and need not be alleged or proved. The intent, in the latter

*2 Leach C. C. 938; 14 Pick. 212; 12 Gray, 326; Heard Crim. Pl. 143.

**3 M. & Sel. 14; 5 Term Rep. 607.

case, being drawn as a legal result from the act, and is proved by proof of doing the act.*

In some cases the law has adopted certain technical expressions to indicate the intention with which an offence is committed; and in such cases the intention must be expressed by the prescribed word or words, and no other. Thus, treason must be laid to have been done "traitorously"; all felonies, whether at common law or created by statute, to have been done "feloniously"; burglary is laid to have been done "feloniously and burglariously," and with intent to commit a particular felony; murder, "feloniously and of his malice aforethought"; forgery, "feloniously and with intent to defraud."**

Wherever a statute makes a guilty knowledge part of the definition of an offence, such knowledge is a material fact which must be expressly averred; otherwise if the statute simply prohibits the act generally, and is silent as to intention. So where a particular knowledge on the part of the offender renders his acts criminal, the fact of his having such knowledge must be expressly averred.***

Sec. 1797. WHERE TECHNICAL TERMS OR WORDS OF ART HAVE BEEN MADE ESSEN-

*Heard Crim. Pl. 145-6; 2 Allen, 180.

**4 Stephen, Com. 370; Archb. Crim. Pl. 61, 62. (18th ed.)

***2 Mason, 143; Heard Crim. Pl. 151; 12 Cush. 499; 7 Allen, 357; 2 Met. 190; 2 Cush. 577. No express form of words is necessary in making the averment of knowledge, "unlawfully, knowingly and designedly," is good.

TIAL TO THE DESCRIPTION OF AN OFFENCE THEY MAY BE USED.—Certain long accepted terms or words of art have become so inseparably connected with distinct offences that no other expression is allowed to replace them. Thus "feloniously," "burglariously," "murder," "ravish," "feloniously stole, took and carried away," and the like, must be used in describing the respective crimes to which they refer.*

Where the indictment is upon a statutory offence, and the statute fully and precisely describes the facts and circumstances which constitute the offence, with no implied exceptions or qualifications including or excluding certain persons or facts, then an indictment which pursues the very words of the statute, is, in general, sufficient. But if any one of the ingredients above mentioned be omitted or misstated, it is ground for demurrer, motion in arrest of judgment, or writ of error. Such a defect is not aided by verdict, nor supplied by the general conclusion *contra formam statuti.*** The statutes defining offences often use general terms and comprehensive descriptions, and in such cases if the mere wording of the statute was followed in the indictment no offence would be charged, as the indictment must charge the offence with certainty and particularity.

If there is an exception in the enacting clause of a statute stating a criminal offence, the indictment

*2 Hawk. P. C. ch. 25, Sec. 55; 11 Pick. 438; 13 Q. B. 446.
**12 Wheat. 460; 92 U. S. 225; 101 Mass. 27.

must show by a negative averment, that the defendant, or the subject of the indictment, does not fall within the exception. But where the exception is in a subsequent clause or statute, or, though in the same section, yet if it be not incorporated with the enacting clause by any words of reference, it is in that case matter of defense for the defendant to show, and need not be negatived in the indictment.*

Sec. 1798. OF THE CONCLUSION OF AN INDICTMENT.—At the common law an indictment was formally concluded by the words, "against the peace of the said State *or* Commonwealth." Under the statutory offences the conclusion is, "Contrary to the form of the statute (or statutes) in such case made and provided."

In general, where the offence has been created by statute, or raised from a misdemeanor to a felony, or revised or altered from what it was at common law the indictment should conclude "against the form of the statute," in addition to "against the peace."**

Sec. 1799. MOTION TO QUASH THE INDICTMENT, WHEN IT MAY BE MADE.—A motion to quash should be made where an indictment is so defective on the face of it that no judgment could be given upon a conviction. The motion is

*Heard Crim. Pl. 179, citing, Com. v. Hart, 11 Cush. 130; s. c. 2 Lead. Crim. Cas. 1; 17 Wall. 168; 121 Mass. 47. "Not being then and there" etc., is the customary form of a negative allegation.

**Heard Crim. Pl. 254.

addressed to the discretion of the court, and when well taken will generally be sustained. In some states the statutes require that any formal defect apparent on the face of an indictment must be taken advantage of by demurrer or motion to quash.*

Sec. 1800. ORDER AND TIME OF PLEADING.—When brought to the bar and arraigned, the prisoner either confesses the charge, stands mute of malice, or does not answer directly to the charge, which, by statutory enactment, may be entered as a plea of not guilty; or pleads to the jurisdiction or in abatement—or demurs—or pleads specially in bar —or generally, that he is not guilty. When he has any special matter to plead in abatement or in bar, or if the indictment is demurrable, he should plead it, or demur at the time of arraignment, before the plea of not guilty.**

Sec. 1801. THE PLEA OF GUILTY IS A CONFESSION OF THE OFFENCE, AND MAY BE EXPRESS OR IMPLIED.—An express plea of guilty is where the defendant confesses in open court that he is guilty of the crime with which he is charged, which is the highest conviction that can be made. This plea may be received after the plea of "not guilty" has been entered. The plea of guilty is a confession of all the facts duly charged in the indictment, and a waiver of all merely technical objec-

*1 Cush. 189; 16 Gray, 601; 10 Allen, 193.
**Heard Crim. Pl. 202.

tions in the indictment. If it is made upon a full comprehension of all the facts, nothing further is to be done but award sentence.*

An implied confession or plea of *nolo contendere,* as it is technically called, like a demurrer, admits for the purposes of the case all the facts which are well pleaded, but is not to be used as an admission elsewhere. It is in the discretion of the court to receive or reject this plea. An implied confession is explained to be where a defendant in a case not capital, does not directly own himself guilty, but in a manner admits it by yielding to the mercy of the court, and desiring to submit to a small fine; which if received and a fine imposed ends the indictment, but if it is not received does not estop the accused from pleading not guilty to the same facts.**

Sec. 1802. OF A PLEA TO THE JURISDICTION.—In order to have jurisdiction to punish an offence committed by a person, the court must have jurisdiction of the offence, of the person, and the punishment awarded must be one which it is competent to inflict for the offence. A plea to the jurisdiction is made where an indictment is returned before a court which has no cognizance of the offence. This plea may be made without answering to the crime charged. And if it appears either from the face of the record or from extrinsic evidence that there is a want of

*12 Allen, 172; 101 Mass. 210; 12 Allen, 155.
**2 Hawk. P. C. Ch. 31, Sec. 3; 12 Allen, 165; 9 Pick, 207.

jurisdiction, the court will quash the indictment after plea pleaded.*

Sec. 1803. OF A PLEA IN ABATEMENT.—A plea in abatement does not go to the merits of the indictment, and is usually for a misnomer of the defendant, and an error in this respect must be taken advantage of by plea in abatement. It is a dilatory plea, and must be pleaded with certainty to every intent. If one indicted for a misdemeanor pleads misnomer in abatement, and the issue is found against him he cannot, as a matter of right, plead over; otherwise if the plea is demurred to and found insufficient as a matter of law. The reason for this is that if a man pleads a fact which he knows or ought to know to be false, and the verdict is against him, it ought to be final. If the judgment is for the defendant on such a plea, it is that the indictment be quashed. The accused may then be re-indicted for the same offence in his correct name; and he will be estopped from denying that he is not properly designated.**

Sec. 1804. OF A DEMURRER.—The province of a demurrer is to object to the sufficiency of the indictment or complaint. It is an excuse for not pleading, and therefore is held to admit for the purpose of the case all the facts well pleaded in the indictment demurred to, but such admission does not pre-

*Heard Crim. Pl. 266.

**8 East, 107; 114 Mass. 280; 3 Pa. St. 262.

vent the accused from afterwards pleading "not guilty," if his demurrer is not sustained.*

Demurrers are of two kinds, *general* and *special.* A special demurrer assigning some special reason for the objection to the indictment, while a general one does not. There is no distinction between the two in criminal pleading.**

Sec. 1805. OF PLEAS IN BAR, SPECIAL AND GENERAL.—Pleas in bar are special and general.

Special pleas in bar are such as preclude the court from discussing the merits of the indictment, either on account of a former acquittal or conviction, or of some subsequent matter, operating in discharge of the defendant, as a pardon. Such special pleas in bar, are: 1. *Autrefois acquit.* 2. *Autrefois convict.* 3. Pardon. That is, a former acquittal, a former conviction, or a pardon.

1. *Autrefois Acquit.* The plea of former acquittal, as well as that of former conviction, results from

*At the common law, on a general demurrer being overruled, the court in its discretion, could refuse to allow the accused to plead over and pronounce sentence as upon a confession. 4 Cox C. C. 42, 44; 2 C. & K. 509; 1 Denison C. C. 565; otherwise if the demurrer was special, L. R. 3 H. L. 323; 54 Me. 570; 110 Mass. 491. In this country, the judgment is *respondeat ouster.*

**"By a demurrer the defendant refers it to the court, to pronounce whether, admitting the matters of fact alleged against him to be true, they do in point of law, constitute him guilty of an offence sufficiently charged against him." Heard Crim. Pl. 271.

the fundamental maxim of criminal jurisprudence, that no man shall be twice put in jeopardy for the same offence (*Nemo debet bis vexari pro eadem causa*).* This principle is preserved and sanctioned by the federal and state constitutions as a sacred maxim.**

A man is "put in jeopardy" in the constitutional sense, when he is put to trial before a court of competent jurisdiction on a sufficient indictment, and has been legally convicted or acquitted by the verdict of a jury, as appears by the record thereof remaining in the court where the verdict was returned.***

The mode of procedure upon a plea of former acquittal is, first to ascertain whether the prisoner could have been lawfully convicted on the first indictment of the crime charged in the second; and then to ascertain whether he was charged by that indictment with that crime. The first branch of this question is matter of law to be decided by the court, and the second a question of fact for the jury. The identity

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*5 Rep. 61. "It is only the ignorant and presumptious who would propose that a man should be liable to be again accused after a judgment regularly given, pronouncing him to be innocent." Per L. C. J. Campbell in Regina v. Bird, 2 Denison, C. C. 216.

**"Nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb." U. S. Const. This clause is construed as being equivalent to the common law principle, that no person shall be twice tried for the same offence. 97 U. S. 520; 12 Pick. 501.

***97 U. S. 520; 4 Mass. 477; 111 Mass. 404; 16 Iowa, 239; 1 N. H. 257.

of the offence may be shown by the testimony of witnesses who appeared before the grand jury as to what they swore; by a grand juryman; by the prosecutor; or any evidence which would show what crime was the subject of inquiry.*

The fact that an original indictment was quashed, abated or adjudged bad on demurrer, or that judgment thereon is arrested or reversed for a defect therein, does not show that the accused has been in jeopardy, within the meaning of the constitutional provision. And where by reason of some defect in the record, the trial has proved abortive, the defendant was not lawfully liable to suffer judgment for the offence charged against him in the first indictment, he has not been in jeopardy, so as to be entitled to plead a former acquittal or conviction in bar of a second indictment for the same crime.**

2. *Autrefois Convict.* This is a plea of former conviction, and is a defense for the same reason as that of former acquittal, under the maxim as to not being punishable twice for the same offence. The same rules apply to it as to the plea of former acquittal.***

3. *Pardon.* A pardon may be pleaded in bar to the indictment; or, after verdict, in arrest of judgment; or, after judgment, in bar of execution. But

*Heard Crim. Pl. 290, 291.
**97 U. S. 520; 13 Allen 554; 105 Mass. 189; 17 Iowa, 329.
***12 Pick. 501.

it should be plead at the first opportunity offered the defendant.*

The only *general* plea in bar, is the *general issue,* which is "not guilty." Upon this plea the defendant may show that he did not commit the offence, or any matter which would justify or excuse it. So the fact that the offence has been barred by the statute of limitations may be shown under the general issue.**

Upon a plea of not guilty it is incumbent upon the state to prove affirmatively every fact and circumstances constituting the offence as stated in the indictment.

Sec. 1806. OF THE VERDICT.—The verdict is the decision of the jury at the close of the trial. In all cases of treason and felony it is required to be delivered in open court in the presence of the accused. In cases of misdemeanor this is not essential. And it is said to be doubtful if it can be received and recorded on Sunday.***

The verdict is delivered by the foreman. And the assent of all the jurors to a verdict pronounced by the foreman in their presence and hearing is conclusively presumed.****

Where the verdict delivered plainly amounts to an acquittal in its legal effect, as where it is "guilty of an assault, but in self-defence," the court should

*109 Mass. 323; 7 Pet. 150.
**2 Lowell, 267.
***125 Mass. 205; L. R. 1 Q. B. 317.
****Archb. Crim. Pl. 176, (19th ed.).

direct an acquittal; but if the verdict is expressed in doubtful terms, the court should explain to the jurors the points by which their verdict should be governed, and send them back to reconsider it.*

"The verdict in a criminal case is either *general,* on the whole charge which the jury are at liberty to find in all cases, both upon the law and the fact of the case; or *partial,* as to a part of the charge, as where the jury convict the defendant on one or more counts of the indictment and acquit him of the residue; or *special,* where the facts of the case alone are found by the jury, the legal inference to be derived from them being referred to the court; whether, for instance, on the facts stated, the crime is murder, manslaughter, or no crime at all."**

The court has the right, and in some cases is in duty bound to require the jury to reconsider their verdict. Where the jury do reconsider their verdict, and alter it, the second, and not the first, is the true verdict of the jury. So the jury themselves may rectify their verdict, after it has been delivered, and before leaving their seats, and the verdict will stand as amended.***

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*Heard Crim. Pl. 300.

**Heard Crim. Pl. 300; 4 Steph. Com. 433.

***14 Gray, 366; 125 Mass. 206; 103 Mass. 214.

PART II.

THE LAW OF EVIDENCE.

CHAPTER I.

THE SUBJECT INTRODUCED AND DEFINED.

Sec. 1807. EVIDENCE IS A BRANCH OF ADJECTIVE LAW, AND MAY BE CLASSED AS A PART OF THE LAW OF PROCEDURE.—The subject of law is divided into two great branches, one of which is designated "substantiative law," and has to do with the determinination and definition of rights, duties and liabilities of persons and property; the other is designated "adjective law," and is concerned with the administration of the law, and the enforcement of rights in just and orderly methods. Evidence is a part of this adjective law, and is also said to fall under the branch of adjective law known as "procedure" since it is employed to obtain individual rights in particular cases.*

*"Its leading purpose is to secure the presentation of matters of fact in such methods and by such means as will enable the court or jury trying the case to reach a just and correct decision upon the questions of fact in dispute between the parties by whom the forensic contest is waged. It determines the qualifications, rights and privileges of witnesses and the

It is the purpose of the law of evidence to decide: 1. What facts may, and what may not be proved in a particular case. 2. What sort of evidence must be given of a fact which may be proved. 3. By whom and in what manner the evidence must be produced by which any fact is to be proved. While these divisions do not include all the law of evidence, they are helpful in the study of the subject. Thus:

1. Under the first head,—what facts may, and what may not be proved,—it is a rule, that the facts in issue, or the facts relevant to the issue may be proved.

2. As to the sort or kind of evidence that must be given,—it is a rule, that the *best* evidence which is capable of being produced must be given.

3. Under the third head,—by whom and in what manner must the evidence be produced,—we have the rule that the evidence must be produced by the person upon whom the burden of proving it is imposed by the issue.

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mode in which they shall make oath or affirmation to testify to the truth. It prescribes and regulates the manner of introducing and presenting evidence, and it lays down rules for determining the competency of evidence, and for determining the competency and qualifications of witnesses. Its rules provide for the mode of securing the attendance of witnesses, and for the mode of conducting the examination of witnesses; it provides means and measures for securing the inspection of documentary evidence; it provides for the method of proving the execution of written instruments, and it provides for the inspection of persons and things." Elliot on Evidence, Sec. 1.

Sec. 1808. CONFIDENCE IN HUMAN TRUTHFULNESS NECESSARY IN THE ESTABLISHMENT OF FACTS.—Evidence deals with facts, and the method of proving facts is by witnesses. Evidence has nothing whatever to do with the law, and is concerned solely with the facts in the case; so that where the laws of a foreign state are in issue, they must be proved in the same manner as other questions of fact; that is, by witnesses.

In order that the facts may be established by witnesses, there must be reliance on such witnesses, and by habit and experience, as well as by necessity, mankind have come to rely upon human truthfulness and to be disposed to believe others. There is also a connection between collateral facts and circumstances established in a case, and the fact in controversy, which experience shows may be relied upon, and this is also a basis of belief along with that of reliance upon human testimony.*

Sec. 1809. EVIDENTIARY FACTS ARE ESTABLISHED IN A JUDICIAL INVESTIGATION.—The investigation of matters of fact in a court of law differs from the establishment of facts as between man and man in the ordinary affairs of life. The reason being that in a court of justice there must be more care and certainty in the method followed on account of the serious results which would follow from a mistake, which in criminal cases might

*1 Greenleaf Ev. Secs. 8-11.

involve the sacrifice of human life itself. The law, which is founded largely on experience, for the best interests of justice excludes certain statements or kinds of testimony in a "legal investigation," which might be relied upon in the ordinary affairs of life outside of courts of justice where such exclusionary rules do not prevail, and which are known as "extra-judicial."

Thus the existence of a fact at some time in the past is ascertained in one of two ways, aside from personal observation: First, by information derived mediately or immediately from those who have actual knowledge of the fact. Second, by means of inference from facts already established. In a judicial investigation the first of these ways is regarded as too unreliable to be used in the establishment of facts. The law therefore interferes and provides certain exclusionary rules which narrow the sources of information that may be used in ascertaining facts. The law interferes not only to shut out certain testimony and thereby provide more certain tests of truth than is necessary or practical in the ordinary affairs of life, but also annexes an artificial effect to particular evidence which would not otherwise belong to it. Therefore, in a judicial investigation, "matters that might otherwise seem admissible are regarded as too remote or as calculated to mislead and confuse or to raise collateral issues, and the statements of third persons not under oath and not subject to cross-examination are not regarded as made under such

circumstances as to entitle them to be admitted when they come under what is known as the hearsay rule. So, there are many facts and circumstances, and matters of opinion or reputation that are excluded, although they might influence the judgment of persons investigating the controversy, and might be heard or shown in evidence if there were no rules of law or evidence. Practical considerations and experience have doubtless influenced the courts and thus moulded our law of evidence to a great extent. The system is the outgrowth, largely, of such experience, policy, and tradition or precedent, and is such as has been thought best calculated, within the bounds of practicability, to get at the truth and subserve the ends of justice."*

Sec. 1810. MEANING OF A FACT.—The word "fact," though commonly used, and apparently simple, is rather an elusive one when it is sought to be defined. It is said to be "an event, occurrence, circumstance, or mental state."** A fact in the abstract may be defined as "an actual reality or verity—something absolutely and inflexibly true—something which has actually existed or does exist—some event which has actually occurred or does occur."*** But the word fact as used in evidence cannot be said to involve such a positive abstraction, and is said to be incapable of adequate definition, though it involves

*1 Elliot on Ev. Sec. 10
**Elliot on Ev. Sec. 8.
***Burrill's Circ. Ev. 218.

the conception of a thing as existing or being true. It is not limited to what is visible or tangible, so that mere thoughts, intentions, and states of the mind, are to be regarded as facts.*

Sec. 1811. EVIDENCE, AND LAW OF EVIDENCE DEFINED.—Evidence in its legal acceptation is defined to be the legal means, exclusive of mere argument, by which an alleged fact is established or disproved.**

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*Thayer's Ev. 191. Facts are sometimes spoken of as positive facts and negative facts. A negative fact is nothing more than the non-existence of a positive or affirmative fact. And the existence of a positive fact is equivalent to the non-existence of an opposite negative.

Matter of fact and matter of law are thus distinguished: A matter of fact is anything which is the subject of evidence; a matter of law is the general law of the land, of which the court will take judicial notice, without any proof, or without any testimony or evidence being introduced.

**Taylor's Ev. Sec. 1; 31 Cal. 201.

"Evidence includes the reproduction before the determining tribunal, of the admissions of the parties and of facts relevant to the issue." Dr. Wharton's definition, cited in Elliot on Ev. Sec. 6.

"The word 'evidence,' in legal acceptation, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." 1 Greenleaf on Ev. (15th ed.) Sec. 1.

"'Judicial evidence' may be defined as the evidence received by courts of justice in proof or disproof of facts the existence of which comes in question before them." Best on Evidence (Chamberlayne's ed.) Sec. 11.

"'Evidence' means: 1. Statements made by witnesses in court under a legal sanction, in relation to matters of fact under inquiry; such statements are called oral evidence. 2. Documents produced for the inspection of the court or judge;

The law of evidence includes all the rules or principles created and existing under the common law, by statutes, and the decisions of the courts. The courts in theory, apply the general principles of the law of evidence to particular cases, and do not declare rules for the government of such cases. The law of evidence pertains to matters of fact, and not to matters of law; the purpose of the law of evidence is to assist in procuring the primary evidentiary facts in relation to the issue at bar.*

Sec. 1812. SOURCES OF EVIDENCE.—The sources of evidence are the common law; the statutes; and the decisions of the courts; though the latter is said to be an interpretation of the common or statutory law rather than an independent source of evidence. The earliest decisions recognizing rules of evidence are quite ancient, though they do not run as far back as do the rules of pleading.**

Among the earliest writers who have arranged and classified the rules of evidence, as Blackstone classified and arranged the common law, is Baron Gilbert, whose treatise is the earliest accessible work and was first published about the year 1700.

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such documents are called documentary evidence." Stephen's Digest of Ev. Art. 1.

"That which is legally submitted to a jury to enable them to decide upon the questions in dispute or issue, as pointed out by the pleadings, and as distinguished from all comment and argument, is termed evidence." Starkie Ev. Sec. 3.

*Elliot on Ev. Sec. 5; 9 Johns. 396; 12 Eng. L. & Eq. 115; 100 Ind. 422.

**1 Term Rep. 707, (1790); 1 Wm. Bl. 365.

The next important work on the subject is that known as "Phillips on Evidence," supplemented in this country by notes of Cowan and Hill, of New York. This American edition was published in 1839 from the seventh English edition. The fifth American edition of this work was published in 1867, and contains notes by J. Edwards. Another English work on evidence is that by Starkie, which has reached its tenth American edition, edited by Geo. Sharswood, 1876. A small compendium of evidence, known as Peek's Compendium, was first published in this country in 1824, from the fifth English edition.

The first edition of the noted work of Simon Greenleaf on evidence was published in 1842, and has reached its fifteenth edition. Taylor's Evidence, is an English work professed to be founded on Greenleaf's American treatise, running through several editions from 1848 to 1884.

Best's "Principles of Evidence" is an English work, originally published in 1849, numerous editions of which have been published. Another English work is the small book by James F. Stephen, known as "Stephen's Digest of Evidence," first issued in 1876, and which has reached its third American edition, dated 1896. The first edition of Wharton's Evidence was issued in 1877, and it has reached its third edition.

Another later English work on Evidence is by J. P. Taylor, an American edition of which has been published with notes by Chamberlayne.

One of the most recent works on the subject is

the work of Byron K. and William F. Elliot, and known as "Elliot on Evidence," it is a four volume work and the first volume was issued in 1904. For the various special subjects under the law of evidence no better authorities can be found than "The American and English Encyclopedia of Law," and The Lawyer's Reports Annotated.

Sec. 1813. OF THE VARIOUS KINDS OF EVIDENCE—EXPLANATION OF THE TERMS USED.—With regard to the nature and quality and the source of belief, evidence is said to be *demonstrative* or *moral, direct* or *circumstantial.* With reference to its legal character and grade it is *primary* or *secondary, prima facie* or *conclusive;* and with reference to its legal character and admissibility, evidence is either *competent* or *incompetent, relevant* or *irrelevant.* Other terms used in describing the kinds of evidence are: *documentary* or *written; parol* or *extrinsic; real evidence; cumulative; corroborative; conclusive* and *satisfactory.* A short explanation of these terms will now be given.

Sec. 1814. SAME SUBJECT—DEMONSTRATIVE AND MORAL EVIDENCE.—Demonstrative evidence is that which is capable of being demonstrated, and is therefore free from all possibility of error, as mathematical demonstrations and experiments.* Moral evidence includes all evidence not obtained from demonstration or intuition, and is the

*1 Greenleaf Ev. Sec. 1.

common sort of evidence employed to prove matters of fact.*

Sec. 1815. SAME SUBJECT—DIRECT EVIDENCE.—By direct evidence is meant that which goes directly to show the existence or non-existence of a matter of fact in issue. Thus, if the very facts in question are within the personal and actual knowledge of the witness, his testimony in regard to them is said to be direct and positive evidence. So evidence furnished by the production and inspection of a thing or object in court, as a writing, without resort to other evidence, inference or presumption, may be classed as direct evidence. And perhaps any evidence which goes directly to establish the *factum probandum* may be called direct evidence.**

Sec. 1816. SAME SUBJECT—CIRCUMSTANTIAL EVIDENCE.—Circumstantial evidence tends to prove the principal fact, or question is issue, not directly, but inferentially and indirectly, by or through the medium of other facts, which are styled evidentiary facts, the establishing of which by a process of

*Elliot on Ev. Sec. 13; 13 Neb. 527.

**"In one sense there is but little direct or positive proof, or such proof as is acquired by means of one's own senses; all other evidence is presumptive, but in common acceptation, direct and positive evidence is that which is communicated by one who has knowledge of the fact." Bouv. Law Dict. Tit. Evidence. See, Starkie Ev. 19; 1 Phill. Ev. 116; 5 Cush. 295.

special inference tends to show the existence of the principal fact.*

Sec. 1817. SAME SUBJECT—PRIMARY AND SECONDARY EVIDENCE.—By primary evidence is meant the *best* evidence of which the case is in its nature susceptible. This refers to the quality of the evidence rather than the quantity, and is not necessarily the strongest or greatest amount of evidence in the case. It is said to be "such evidence as may be called for in the first instance, upon the principle that its non-production gives rise to a reasonable suspicion that if produced it would tend against the fact alleged."**

Secondary evidence admits or presupposes more original sources of information, but is admitted both because it tends to prove the fact in issue, and because the best or primary evidence cannot be obtained. Thus, in case a written contract is in question, the contract itself is the best or primary evidence of what it contains, but secondary evidence by witnesses who had seen it, would be admissible after the contract was shown to have been lost or destroyed.***

Sec. 1818. SAME SUBJECT—PRIMA FACIE AND CONCLUSIVE EVIDENCE.—Prima facie

*Commonwealth v. Webster, 5 Cush. 295; 62 Am. Dec. 179; 113 Mo. 475; Burrill's Circ. Ev. 4.

**Abbott's Law Dict. 448; 17 Md. 67; 58 Tex. 680; Elliot on Ev. Sec. 16.

***122 Ind. 427; 56 Fed. Rep. 786; 98 Mich. 168.

evidence is that which without contradiction or explanation appears sufficient to support a fact in issue. It is not conclusive, in that it may be rebutted or explained away by other evidence.*

Conclusive evidence, in law, means evidence which is not capable of being contradicted, and which is of such weight that the court is required to regard the fact as established, and therefore exclude evidence tending to disprove it.** In a more popular sense, it means such evidence as uncontradicted conclusively establishes the fact to which it relates and controls the decision thereon.

Sec. 1819. SAME SUBJECT—COMPETENT AND INCOMPETENT EVIDENCE.—By competent evidence is meant that which is by the rules of law fit and appropriate to establish the matter of fact in dispute, or "that which the very nature of the thing to be proved requires."*** Incompetent evidence is such as is not fit and appropriate to the issue, or is excluded by the rules governing the competency of witnesses.

Sec. 1820. SAME SUBJECT—RELEVANT AND IRRELEVANT EVIDENCE.—What constitutes relevant evidence will be considered at length hereafter, at present it is sufficient to state, that in general, to be relevant, evidence "must have some

*104 N. Car. 566; 97 Mass. 230; 144 Ind. 463.
**11 Am. & Eng. Encyc. of Law (2d ed.), 491; 63 Iowa, 599.
***Bouv. Law Dict. Tit. Competent Ev.

logical connection with or relation to a fact in issue so as to assist in getting at the truth of it."*

Sec. 1821. SAME SUBJECT—DOCUMENTARY OR WRITTEN EVIDENCE.—Documentary evidence embraces all evidence obtained from written instruments or documents, and includes all material substances on which matters capable of being understood are represented, whether by writing or other mark or symbol.**

Sec. 1822. SAME SUBJECT—PAROL AND EXTRINSIC EVIDENCE.—By parol evidence is meant oral evidence, produced by spoken words from the witnesses. It also is used to designate evidence that need not be in writing, whether it is or not, in which sense it is synonymous with *extrinsic evidence,* meaning, evidence independent and outside of a writing the construction or effect of which is in question.***

Sec. 1823. SAME SUBJECT—REAL EVIDENCE.—Real evidence is a term used to denote that class of evidence presented to the senses of the court or jury, as where a visible object is presented

*Elliot on Ev. Sec. 21. "The meaning of the word relevant, as applied to testimony, is that it directly touches upon the issue which the parties have made by their pleadings, so as to assist in getting at the truth of it."—By the Court, in Platner v. Platner, 78 N. Y. 90-95. See, Stephen's Digest of Ev. Art. 1.

**Elliot on Ev. Sec. 22.

***Bouv. Law. Dict. Tit. Extrinsic Ev.; 35 N. Y. 375.

for their inspection, as evidence of its existence and condition.*

Sec. 1824. SAME SUBJECT—CUMULATIVE AND CORROBORATIVE EVIDENCE.—Cumulative evidence is defined as evidence of the same kind and to the same point as that already given.**

Corroborative evidence is additional evidence tending to prove similar facts, or facts which fortify and substantiate evidence already given. Such evidence is admissible, but in the discretion of the court the extent of it may be limited.

Sec. 1825. SAME SUBJECT—SATISFACTORY EVIDENCE.—The expression "satisfactory evidence" is used occasionally as meaning such an amount or weight of evidence as is requisite to determine the issue in a particular case.***

Sec. 1826. OF THE MEANING OF THE WORDS "TESTIMONY" AND "PROOF."—The word "testimony," though commonly used as synonymous with "evidence," means what is said by the witnesses upon the stand, which may or may not be so in accordance with the rules of evidence to be entitled "evidence." The word "proof" means the result of evidence, or its effect, while evidence is the means or medium of proof. But these words are also commonly used in the same sense.****

*135 Ill. 522; 113 Mass. 136; 76 Mich. 173.
**100 Ind. 315; 24 Pick. 246; 38 W. Va. 727.
***86 Iowa, 420; 55 Neb. 317.
****36 Iowa, 106.

CHAPTER II.

OF THE RULE REQUIRING THE BEST EVIDENCE.

Sec. 1827. IT IS A GENERAL RULE THAT THE BEST EVIDENCE MUST BE PRODUCED WHICH IS CAPABLE OF BEING PRODUCED. —One of the most general and far-reaching rules of evidence is that the best evidence of which a matter is susceptible must always be produced. This rule is said to lie at the foundation of nearly all the principles of evidence, and is never lost sight of in determining the admissibility of evidence. It applies alike to oral and documentary evidence.* The rule is based upon the presumption that if better evidence is withheld and less important and inferior evidence presented, that in all likelihood the better evidence would not support the contention of the party, and is therefore kept back. The requirement that the best evidence must be produced therefore tends to prevent fraud and also bring out the most original evidence.** The rule only extends to quality and not to quantity, so that all witnesses having a legitimate knowledge of the fact in dispute, or subject of investigation, may testify, though some may be better informed than others.***

*1 Best on Ev. (Morgan's ed.) Sec. 87.

**6 Pet. 352.

***128 Pa. St. 442; 5 L. R. A. 515; 81 Mich. 75; 22 Atl. 974; 73 Miss. 387.

Sec. 1828. THE BEST EVIDENCE RULE RESULTS IN A DIVISION OF EVIDENCE INTO PRIMARY AND SECONDARY.—The rule that the best evidence must be produced, leads to the division of evidence into primary and secondary, or original and unoriginal, as the two classes are sometimes called. In the profession primary evidence is denoted by the word "original," and secondary evidence by the expression "hearsay," though not all secondary evidence is to be classed as hearsay. The word hearsay has a settled meaning, though it is varied to some extent by the different writers on the subject of evidence. Evidence which is not primary or original is sometimes called unoriginal; also second-hand, derivative, and substitutionary as well as hearsay. The word "secondary" will be used in this discussion in connection with written evidence, as denoting a substitute for the written evidence, where the written evidence itself has been lost or destroyed.

In the discussion of oral evidence we will use the word "original" and "hearsay," as they are the terms ordinarily used by the profession. Where the contents of a written instrument are in question, oral evidence cannot be considered and admitted as original or primary evidence, since nothing can be considered so authentic as to what it contains as the letter itself. But if the letter is lost, and it contents are in question, secondary evidence must of necessity be admissible.*

*16 Pick. 227; 81 Wis. 135; 125 Ill. 653.

Sec. 1829. MEANING OF "PRINCIPAL FACT" AND "EVIDENTIARY FACT."—The fact sought to be proved is called the "principal fact," and the facts which tend to establish the principal fact are termed "evidentiary facts." Evidentiary facts are explained to mean facts affording evidence or proof of a fact having an independent probative force of its own.

Sec. 1830. EXPLANATION OF BEST EVIDENCE RULE.—The rule requiring the best evidence to be produced, means that the evidence must be of such a character as to have an independent probative force of its own, and not derive its force from, through, or under some other fact, as is the case in secondary evidence. Again, it is said that the best evidence must indicate from its own character that there is no better evidence back of it. The testimony of a living witness to be original evidence must be in reference to facts which came under the cognizance of his senses. But since the rule relates to the quality of the evidence and not to the quantity, it only operates to exclude such evidence as indicates more original sources of information. The word "best" therefore does not extend to discriminate between witnesses equally qualified to testify to the same fact or facts. The credit to be given witnesses is to be determined by the jury, and not by rules of evidence in advance. The rule in practice amounts to this, that the best grade of evidence must be adduced.

Sec. 1831. HEARSAY EVIDENCE EXPLAINED.—Hearsay evidence is that kind of evidence or testimony from a witness in a legal proceeding, which depends solely or in part for its truth or falsity in the first instance, upon the statement of some other person than the witness, and having in and of itself no evidentiary force.* To illustrate, in a case of assault and battery, A is called as a witness, and asked if he knew which of the parties to the suit struck the other first. A in fact did not see the matter, but was told by B which one of the parties struck first. A's evidence, therefore, is hearsay, depending solely for its truth or falsity upon the statement of some other person than the witness, which statement from such other person not being sworn to or subject to cross-examination is regarded as of no evidentiary force.

Sec. 1832. AS A GENERAL RULE HEARSAY EVIDENCE IS TOTALLY INADMISSIBLE—REASONS.—As a general rule hearsay evidence is totally inadmissible, but there are numerous exceptions and qualifications to the general rule to be

*7 A. & E. 313; 46 Md. 154; 62 Ind. 175. The term hearsay is applied to that which is written or done by others, as well as that which is spoken. 102 Mass. 67; 44 Ia. 229.

"Hearsay is that kind of evidence which does not derive its force solely from the credit due to the witness, but rests also in part upon the veracity and competency of some other person, from whom the witness may have received his information.—Phillips Ev. 185; 110 U. S. 574.

hereafter noted. The chief reasons for holding hearsay evidence inadmissible are:

1. The party against whom such evidence is offered has no opportunity of cross-examining the original source from which it is derived.

2. The deposing witness, that is, the witness testifying, though he may in good faith attempt to speak correctly, may have imperfectly heard, misunderstood, or inaccurately remembered the statement which he attempts to repeat. Also the witness if dishonest may intentionally swear to a false statement.

3. The original statement is not delivered under the sanction of an oath, or in the presence of a court of justice, or others who may be cognizant of the truth or falsity of the matter; neither is it delivered with that careful deliberation with which oral testimony comes from the witness stand; or with that opportunity on the part of the judge and jury to observe the deportment of the person making the statement, which is the case when a person appears as a witness.

4. Though the deposing witness himself delivers his testimony under the sanction of an oath, yet he may have no real fear of the penalty of the law if he speak falsely. He may, therefore, intentionally pervert the original statement, or entirely fabricate it.

5. Abuses would be likely to arise from a non-discrimination by juries between original and second-hand evidence, and the force and weight that ought to be given to each.

The rule excluding hearsay will be applied notwithstanding the fact that no better evidence can be found, and it is certain that if it be rejected no other evidence can possibly be obtained. Thus, if one person be an eye-witness to the commission of a crime, and then tell another what he saw, the testimony of the second party as to what was told him would not be admissible though the party telling him had since died. The party who is simply informed of a fact by someone else knows nothing whatever, of his own personal knowledge, as to the facts or right of the parties, and is therefore not allowed to testify.*

Sec. 1833. OF EXCEPTIONS TO THE GENERAL RULE EXCLUDING HEARSAY EVIDENCE.—As it is impossible and impracticable that the witnesses to an event should be present in all cases where the event is in dispute, the rule excluding hearsay evidence of necessity has been honey-

*14 Gray, 394; 7 Cranch, 290; 157 Ind. 179; 143 Ill. 571. Neither is hearsay admissible on the ground that it tends to corroborate other testimony. Illustrations of objectional testimony on the ground of being hearsay are: The testimony of a cashier in a bank that no officer of the bank had knowledge of a defence to a note; statements of a deceased subscribing witness to a will as regards its execution, etc.; 25 Ind. App. 341; 114 U. S. 232; 162 Mass. 137; 157 Ind. 179. Writings may be excluded as being mere hearsay evidence, thus, where the question in dispute is the age of the insured in an action on an insurance policy, printed obituary notices, an engraved coffin-plate, the certificate of the board of health, all based upon the information given by the undertaker, are held inadmissible. 201 Pa. St. 363; 94 U. S. 593; 79 Md. 375; 66 N. J. Law, 385; 67 Cal. 458.

combed with numerous exceptions, some of which are claimed by certain authors to be independent rules rather than exceptions to the rule excluding hearsay.* But whether classed as exceptions to the general rule or independent rules is not material so long as it is understood that certain kinds of evidence are admissible notwithstanding the rule excluding hearsay. These various classes of cases in which the hearsay rule is not applicable are known in law as "declarations," and may be classified as follows:

1. Declarations were the fact whether the declaration was made or not, and not its truth or falsity is in issue.

2. Declarations relating to, or a part of the *res gestæ*.

3. Declarations relating to bodily or mental feelings.

4. Declarations relating to pedigree.

5. Declarations of deceased persons against interest.

6. Dying declarations.

7. Declarations relating to matters of public and general rights.

8. Reported testimony and certain declarations under oath.

9. Declarations relating to ancient documents and matters.

These so-called exceptions to the hearsay rule are sometimes differently classified by the various authors

*See Greenleaf on Ev.; Thayer's Ev. Sec. 520 et seq.

on evidence, but may all be considered under the above classification.*

I. OF DECLARATIONS WHERE THE FACT, WHETHER THE DECLARATION WAS MADE OR NOT, AND NOT ITS TRUTH OR FALSITY IS IN ISSUE.

Sec. 1834. WHERE THE ISSUE IS WHETHER OR NOT THE STATEMENT WAS MADE IT IS REALLY ORIGINAL EVIDENCE.—When

*Elliot on Ev. gives the following as exceptions under the hearsay rule:

"1. Dying declarations. 2. Declarations in cases of pedigree. 3. Declarations as to matters of public or general interest. 4. Public documents. 5. Ancient documents, ancient possessions, and other ancient matters. 6. Entries and declarations against interest. 7. Account books of parties to the litigation. 8. Entries and declarations of third parties made in the regular course of duty or business. 9. Declarations bearing upon the physical or mental condition of the declarant, or upon his intention. 10. Declarations which are a part of some fact or transaction (res gestae) that is itself admissible. 11. Reported testimony and certain declarations under oath."—Sec. 331.

"In addition to all these ancient and always approved practices in their simple, original shape, operating as qualifications of the hearsay prohibition, there have come in many extensions of them; as when oral declarations of deceased persons against interest were received, and, in England, even oral declarations of deceased persons in the course of duty or business. And not only has the scope of these old titles been enlarged, but new exceptions have been made; or perhaps they are rather old ones coming to be recognized and formulated; such as those relating to the res gestae, i. e., declarations which are a part of some fact itself admissible, and declaration of present intention or present physical sensation. Such things are the natural development of the subject." Thayer's Ev. 520-521.

the question is whether or not statements were made, and not as to their relation to the fact in controversy, it is apparent that the testimony of a witness hearing the statements made would be orginal evidence of the fact of their being made, and such testimony is not hearsay, though sometimes classed as an exception to the rule excluding hearsay. So when the question is as to whether a party acted prudently, wisely, or in good faith, the information on which he acted, whether true or false is original evidence. The question is as to what information he had, and not whether the information was true or false.*

In cases of slander and libel, where the defendant denies the making of the slanderous statements, the witnesses who heard them made are competent to testify; as the main question is, as to whether or not the statements were made. Such testimony is original and has evidentiary force of its own, and rests solely upon the credibility of the witness from whom it comes.** The rule is applicable in cases of malicious prosecution where the question is whether the defendant acted with or without probable cause.*** So replies made to inquiries at a residence are sometimes admitted as original evidence. Thus the denial of a servant that a party is at home may be shown by the testimony of a party to whom it was

*25 N. J. L. 566; 103 Iowa, 389; 1 Conn. 387; 183 Mass. 577.
**9 Johns. 45; 84 Mich. 1; 74 Cal. 482.
***32 Mich. 332; 66 Barb. 139; 4 Cush. 217; 16 Ohio St. 468.

made. But the fact as to whether or not the party was home must be shown by other evidence.*

Sec. 1835. GENERAL REPUTATION.—Evidence of general reputation, when admissible, is considered as original evidence, or as an exception to the hearsay rule, though it is composed of the statements of third persons not under oath.

General reputation is what the general public say about a person in the community in which he lives. It is not the opinion or statement of a single individual, but the general standing in the community as a whole. It does not follow that a great number of witnesses are required to establish the general reputation of a party. It is permissible to ask one witness what A's general reputation is in the community, but not what a single individual says regarding A.** General reputation being a fact to be established, it follows, that if A tells B what the general reputation of C is, and B undertakes to testify from this information alone, his testimony is inadmissible as hearsay evidence.

General reputation is admissible when the truth or veracity of a witness is attacked, which may always be done. Otherwise general reputation is only admissible when the very nature of the proceedings, or

*8 Daly, 518.

**122 Mass. 501; 63 Mich. 383; 75 Mich. 472; 20 Mich. 105. In the last case it was held that the general reputation of the unfitness of a railroad engineer may be admitted in evidence for the purpose of charging the company employing him with knowledge of such unfitness.

the pleadings themselves are such as to put the character of the party in issue upon any particular subject. Otherwise the general reputation of a party is not admissible because a party is presumed to be innocent, peaceable, and have a good character. In criminal cases the character of the accused may not be attacked unless he first introduces evidence in regard to it.

Sec. 1836. MARKET VALUE.—The same principle which we have been discussing in the last section applies as to the proof of market values. Any person who knows what the market value of a thing is, may testify on that point, though he does not deal with the article in question, and has never bought or sold the same. The testimony of the witness in such cases may be based upon the newspaper quotations, or the statements of parties who handle the goods concerning which the inquiry is made.*

In the matter of proving market value of personal property and domestic articles the rule is rather liberal. In one case a witness was permitted to testify to value on the strength of having purchased but one article.** Every man and woman who keeps a house must be presumed to have sufficient knowledge as to the cost of furniture and other articles to enable them to testify before a jury as to the market

*98 Mich. 231; 14 Mich. 489; 3 Wall. 114; 31 Mich. 443; 56 Ohio St. 68; 60 N. Y. 469; 163 Ill. 409; 55 Md. 11; 41 Minn. 548; 70 Iowa, 316.

**70 Iowa, 316; 42 Mich. 144.

value of such articles.* And it seems that though there is no market value for a particular article at a particular place or at all, yet witnesses may testify to the value of such article, their testimony being based upon the experience acquired in the ordinary conduct of business affairs, and from means of information such as are usually relied upon by men engaged in business.**

Sec. 1837. OTHER APPARENT EXCEPTIONS TO THE HEARSAY RULE, WHICH ARE NOT HEARSAY IN A STRICT SENSE.—Prior inconsistent statements made by a witness may be shown to impeach him. And statements by third persons may be narrated by a witness to show how other matters became fixed in his memory, but statements so narrated are not evidence of the fact they purport to deal with.*** In the proof of a parol or verbal contract, the statements of the parties may be proved by third persons who heard them in order to establish what was said and done that the jury may determine the nature of the contract entered into.****

Sec. 1838. WHEN HEARSAY EVIDENCE IS ADMITTED WITHOUT OBJECTION IT MAY BE CONSIDERED BY THE JURY.—The failure to object to evidence which would be excluded un-

*94 Mich. 551.

**93 Mich. 420; 38 Kan. 307; 117 Mass. 523; 58 Vt. 409; 107 Ill. 365.

***117 Mass. 523; 105 Mich. 549; 65 Cal. 307; 78 Ga. 525.

****7 Gray, 155; 8 Cal. 538; 116 Cal. 249.

der the rule as hearsay evidence, waives the objection to such evidence, and the jury may consider the evidence along with the rest giving it such weight as they see fit.*

II. DECLARATIONS RELATING TO, OR A PART OF THE RES GESTAE.

Sec. 1839. MEANING OF THE TERM RES GESTAE.—The word "res" literally means "a thing," and "gestae" is from the Latin word meaning to happen, take place, or to be done. Hence, "res gestae" means things done, whether acts or exploits. As a legal phrase in the law of evidence it refers to acts which accompany and are a part of the transaction in controversy, and tend to explain it. Therefore, a declaration to be a part of the res gestae must be a part of the things done; of the acts or events surrounding the thing in controversy which is the subject of legal proceedings.

The res gestae may be the principal fact or facts, or may be some of the subordinate facts; that is, it may be the main litigated fact, or it may be some fact relating to and closely connected with the main litigated fact.

Sec. 1840. DECLARATIONS RELATING TO, OR A PART OF THE RES GESTAE ARE ADMISSIBLE WHEN.—Declarations, which accompany and are a part of the fact or matter in controversy and tend to illustrate or explain it, such transaction being

*163 Mass. 404; 104 Ind. 70; 30 Wash. 594.

itself admissible, are also admissible as being so connected with the transaction as to be a part of it.* The reasons or grounds on which declarations a part of the res gestae are admissible is that they are the natural and spontaneous utterance of the declarant, and are so closely connected with the transaction in controversy as to be free from the imputation of design or premeditation. And their weight consists in showing the actual and natural state or feelings of the declarant as to the matter in controversy at or near the time of its taking place.** While classed as exceptions to the rule against hearsay, such declarations may also be considered as having somewhat the characteristics of original evidence.

The following propositions are usually accepted as controlling the admissibility of such declarations in evidence:

1. The declaration must be contemporaneous with the thing done, or the litigated act to which it relates. Or, to express it differently, it must not be a mere narrative of a past transaction.

2. It must limit, explain, or characterize the thing done, or the litigated act, so as in a just sense to be a part of it, and important to its complete understanding.

3. The declaration is not usually admitted as proof of the thing litigated; that is, of the act which is being inquired into.

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*Elliot on Ev. Sec. 537; 112 Mo. 374; 95 N. Y. 274; 49 Ohio St. 25; 95 Mich. 412; 104 Ill. 248.

**Elliot on Ev. Sec. 538.

4. Declarations of strangers or by-standers are admissible within certain limitations.

5. The declarations may be oral or written.

These propositions will now be amplified and explained in their order.

Sec. 1841. THE DECLARATION MUST BE CONTEMPORANEOUS WITH THE THING DONE, ETC.—Under the proposition that the declaration to be admissible must be contemporaneous with the thing done, and not a mere narrative of a past transaction, two things are to be considered:

1. The sweep of the res gestae, by which is meant the time consumed by the acts done. 2. The meaning of the word contemporaneous in this connection.

1. As regards the sweep of the res gestae, it may include a considerable period of time, or only a moment of time. In order, therefore, to determine the admissibility of declarations, it is necessary to determine the sweep of the res gestae, or the time consumed in connection with the act. To instance, the running of a train from Cleveland to Chicago may require a day's time, and the sweep of the res gestae as to such matter would be the time occupied in running the train from one point to the other; again, if the question is the moving of a train a distance of ten feet, then the sweep of the res gestae would be the time required in doing so; or, if a business man completes several transactions or negotiations in a single day, then the sweep of the res gestae is limited to the time he is employed in accomplishing each of them separately,

while if he occupies several weeks in a single transaction, it would be correspondingly extended.

2. The word contemporaneous literally means agreeing in point of time. And it is said that the declarations must be contemporaneous with the act done, and this strictness is supported by the English authorities. But according to current American authorities the word contemporaneous does not necessarily signify the concurrence in point of time. So that, if the thing done continues to exert a directing influence on the mind of the declarant, or if the declaration can fairly be taken to be the natural and inevitable outcome of the circumstances under which it was uttered, it may be said to be contemporaneous, although it may not be exact in point of time.*

Sec. 1842. THE DECLARATION MUST LIMIT, EXPLAIN, OR CHARACTERIZE THE THING DONE, ETC.—The proposition that the declaration to be admissible must limit, explain, or characterize the thing done, or the litigated act to which it relates, so as in a just sense to be a part of it, and important to its complete understanding, needs little explanation. It may be said that a declaration does limit, explain or characterize the thing done, when the origin, nature,

*22 Ky. L. R. 979; 56 N. Y. 273; 35 Cal. 49; 41 Conn. 55. "But when the declarations stand isolated, as, in most cases, when they are made a considerable time before the transaction or a considerable time after it, they will be rejected." Elliot on Ev. Sec. 541; 144 Mass. 244; 76 Pa. St. 106; 118 Ill. 384; 108 Ind. 283.

object, or the motive of the act, is the subject of inquiry.*

Sec. 1843. GROUND OF THE RULE ADMITTING DECLARATIONS A PART OF THE RES GESTAE.—Passing for the present the other propositions controlling the admissibility of declarations a part of the res gestae, which may be explained under the cases illustrating the subject, it may be said that the ground for the admission of such declarations is that ordinarily a person in the absence of any motive to speak falsely, will tell the truth, and the statements referring to his own acts and conduct as to special transactions in which he is engaged may be the most likely and characteristic evidence as to the true nature of these transactions. The limitation of the rule to declarations contemporary with the transaction is grounded upon the self-evident proposition that the language and demeanor of a person at the time of doing a particular act, is more apt to be a true disclosure of what is passing in his mind than any subsequent statement.

Sec. 1844. LEADING CASES ILLUSTRATIVE OF THE EXTENT AND LIMITATIONS OF THE ADMISSIBILITY OF DECLARATIONS AS PART OF THE RES GESTAE.—An examination of some of the leading cases may best explain the extent and limitations of the admissibility of declarations as part of the res gestae.

*7 A. & E. 313; 38 Kan. 259; 36 Ind. 280.

In the case of Queen v. Beddingfield,* an English case decided by Chief Justice Coburn at Nisi Prius, the accused was being tried for murder. A witness was called who had seen the murdered woman coming out of the house with her throat cut, and was asked if she made any statement, to which the reply was yes. He was then asked what the woman said, and this question was objected to on the ground that it was no part of the res gestae, though the injury had been inflicted but a few moments before the statement was made, and the statement was, "See what Harry has done." The objection was sustained by the Chief Justice on the ground that the declaration referred to a past transaction. This case has been criticised and cannot be regarded as an authority in America. It is said that the declaration should have been admitted as being so closely connected with the principal event, and so near in point of time as to preclude the possibility of being a false statement.

*14 Cox Crim. Cases, 341. In McCarrick v. Kealy, 70 Conn. 642, it was held that a statement of a child to her mother five minutes after she was injured, made while entering the gate, crying, that Kealy's dog had bitten her, was held inadmissible; the court saying, that to render such a statement admissible as part of the res gestae it must characterize or explain some material act which it accompanies. Her declarations made while the injuries were being inflicted would be a part of the occurrence and admissible, but after the act by which she was injured had been completed, they were but a narrative of a past event, and objectionable as hearsay. We think that this decision is too technical, and overlooks every element in the admission of such statements except that of time.

In an Indiana case,* a person was on trial for the murder of a woman; a witness was called who had heard the injured woman scream, and had immediately jumped out of bed, put on his trousers, boots, coat and vest and ran to the house about three hundred yards distant, and found the woman shot. The witness fixed the time between hearing the scream and his reaching the house at about a minute and a half or two minutes. He found the woman standing on the floor distressed and excited and crying. In the lower court the witness was permitted to testify under objection what the woman said as to her condition; the Supreme Court reversed the decision of the lower court on the ground that the statement should have been excluded as inadmissible not being a part of the res gestae. But perhaps the trial court was right, as the declaration offered in proof was so connected with the main fact as to form with it one continuous transaction.

In Ohio Railway v. Stanley,** the case before the court was that of an injury received by a brakeman while making a "running switch." About two minutes after the accident in which the brakeman was injured, the engineer left his engine and went about a car's length and heard the declarations of the brakeman, and these declarations were admitted in evidence as part of the res gestae.

In another Indiana case,*** the declarations of the

*57 Ind. 46.
**31 N. W. 180.
***116 Ind. 566. In 69 Cal. 533, where a child was run over

deceased person were made within two minutes after the injury was received, while he was yet in the presence of the train and in presence of the defective machinery, and such declarations were received in evidence as part of the res gestae. It might be asked what difference it makes whether the declaration was made in presence of the machinery or not? But this fact is given emphasis by the court, they being considered silent witnesses in corroboration of his statements, and therefore excluding the idea of calculation or ability to manufacture evidence for particular purposes.

In a Massachusetts case decided in 1851,* Justice Fletcher distinguishes such declarations from hearsay evidence, because there is some particular fact to which the declaration is attached, and it must be incident to the litigated act. Such a declaration does not depend for its credit and effect solely upon the statements of the person making it, but upon the the surrounding facts and circumstances. Hence there must be some main act which is itself admissible in evidence, outside of the declaration, and the declaration is admissible only in consideration of its bearing upon such main fact or act. So that the largest class of cases in which such declarations are admissible are those in which the state of mind or motive

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by a train, and a witness went to the engine and reached it about five minutes after the occurrence, where he heard the engineer and brakeman make statements as to the accident. These were received in evidence by the trial court, but rejected by the Supreme Court.

*9 Cush. 36.

with which the act or any part of it was done, is the question to be determined.

In Wright v. Titum,* the question was as to the admissibility of certain letters which were found after the death of a person in his private room, and which were claimed to bear upon the question of his sanity, which was the point at issue. The question arose whether there was any act admissible in evidence which these letters from a third party would qualify, illustrate or explain. On trial before the Barons, the letters were rejected. In the Exchequer Chamber the letters were admitted by a divided court; the case was re-tried and the letters held inadmissible, and on appeal to the House of Lords this decision was upheld by a divided court. This case shows how close the question is and how difficult for the various courts to draw the line between what is admissible and what is not.

Insurance Company v. Mosley,** is a leading case in this country, which was decided in 1869. Mosley held an accident policy on his life in favor of his wife, and to recover the insurance on such a policy

*5 C. & F. 670.

**8 Wall. 397. See also, 3 Cush. 181; 6 C. & P. 325. In Murkle v. Town of Bennington, 52 Mich. 156, the statements of an injured man to his physician, at a house where he was removed after the accident, and a short distance from the place of the accident, were held inadmissible as a narrative of a past transaction. Such declarations when a part of the res gestae are admitted whether they are for or against the party making them.

it was necessary to show that death was caused by accident. Mosley died on July 22, 1866, and his wife brought an action on the policy, claiming that the husband had met death by accident. It was claimed by Mrs. Mosley that on Wednesday night, July 18th, her husband got up and went out, between twelve and one o'clock; she did not know how long he had been gone, but when he came back he said he had fallen down the back stairs and almost killed himself. Mosley's son who slept in the lower part of the house and said that when his father came in he asked him what was the matter, and he replied that he had fallen down the back stairs and hurt himself very badly. This testimony was admitted in the district court, and the plaintiff obtained a verdict. It was taken to the Supreme Court of the United States by the Insurance Company, which claimed that Mosley had died of disease, the disease being congestion of the brain, and that as there were no marks or bruises on his body, and no evidence of a fall except the statements of the wife and son, there was nothing to which the declarations could attach and they were mere narratives of a past act, which alone could not support or prove the fall itself, and without proof of the fall there was no evidence of an accident and no recovery could be had on that account. In the Supreme Court, it was held competent to prove the fall by the declarations of Mosley made under the circumstances of the case, and that as to the matter of the declarations being contemporaneous with the

main fact to which they relate, that time was not the only element governing the admissibility of such declarations, but all the circumstances of the case must be considered. It was stated by the court, that in the complexity of human affairs, what is done and what is said, are often so related that neither can be detached without leaving the residue ineffectual. To reject a verbal fact would not infrequently have the same effect as to strike out the controlling paragraph from a sentence, or the controlling sentence from its context. In the ordinary concerns of life no one would doubt the truth of these declarations.

The case of Felton v. Amadon,* is a good illustration of the sweep of the res gestæ in certain cases. The plaintiff had brought an action against the defendant for enticing his unmarried and minor daughter from his house, taking her to Milwaukee and leaving her in a brothel. The girl's declarations were offered in evidence, some being made at a hotel in Milwaukee before being taken to the brothel; and others after she had arrived there. In the Supreme Court it was held that the declarations made at the hotel should be admitted and those at the brothel rejected, since the act of enticing terminated when they left her at the house, and her declarations there would

*43 Wis. 242. See also, 119 U. S. 99; 16 Ill. 569; 55 Ark. 248. In the last case the exclamation of another party who said, "Here comes a train running into us!" might be admitted where it was made at the time a party hearing it had jumped from a train and thereby suffered injuries its purpose being to show that the party injured had acted prudently.

be a narrative of past events, while those at the hotel would be within the sweep of the res gestæ, which extended from the time the transaction commenced until it closed.

In Railway Co. v. Herrick,* decided by the Supreme Court of Ohio, in 1892, a man was injured by an incoming train, while crossing the track. He had been informed that the train was late and therefore that it was safe to cross, and he was allowed to give in evidence his knowledge and also the statement of others on that point. He was also permitted to give in evidence the declarations of by-standers as to the fact that the train was late as bearing upon his right to cross the track without contributory negligence. The Company claimed that he was on the track without any right, knowing that a train was due. He claimed that he was on his way to another train that ran to Collins, and he was permitted to give in evidence his own declaration to his clerk when he left the house, that he was going to Collins. The court said that his declaration to his clerk was explanatory of his departure, and was contemporaneous with his leaving, and was evidence of the fact that he did leave. They accompanied the act of departure and explained his object, and thus threw light on the subject of inquiry.

Where the question was as to the identification of the accused as the person who committed a crime,

*49 Ohio St. 25. See also, Railroad Co. v. Steinburg, 17 Mich. 99; 38 Mich. 501; 25 Gratt. 291; 25 Gratt. 943.

witnesses were permitted to testify to their identification of the accused a day after the crime, by their declarations at that time on seeing him, towit: "There goes the man," and the reply of the other witness, "Yes, there he goes."*

In Waldele v. Railroad Company,** where one fatally injured by the cars, made an explanation of the affair half an hour after the injury was received, and yet such statements were received in evidence as a part of the res gestæ.

Sec. 1845. DECLARATIONS MADE BY AGENTS, CO-PARTNERS, OR CONSPIRATORS. —If it is shown by extrinsic evidence that a person is an agent, and acting within the scope of his agency, his declaration so made will bind his principal. The declarations of a co-partner, when shown by extrinsic evidence to be within the scope of the partnership will bind all the partners. And the declaration of a conspirator will bind fellow conspirators, when by extrinsic evidence they are shown to have been interested in and participating in the conspiracy.***

*Lauder v. People, 104 Ill. 248.

**95 N. Y. 274; 47 Am. Rep. 41. See also, 119 U. S. 91; 92 Ind. 269; 9 Cush. 36. In the Indiana case declarations made half an hour before the act in question were held admissible, on the ground that they were part of a continuous quarrel or altercation. See also, 87 Ga. 681; 151 Mass. 359.

***It is said that the question in such cases is rather one of authority than as pertaining to the question of what belongs to the res gestae. Elliot on Ev. Sec. 564; 10 Ves. 123, Mechem on Agency, Sec. 714; 64 Iowa, 568; 120 Ind. 73; 168 Pa. St.

Sec. 1846. SWEEP OF THE RES GESTÆ IN CERTAIN CASES.—In cases of rape the rule as to acts a part of the res gestæ differs somewhat, as the declarations of the woman need not be contemporaneous with the act. The rule simply requires that complaint should be made as soon as possible or convenient, and if complaint was not made at the first opportunity it would be regarded as a suspicious circumstance, tending to impeach her evidence. Some courts allow such a complaint to be admitted as original evidence.*

So in bankruptcy cases a declaration of the bankrupt as much as a month after the act of bankruptcy may be admitted in evidence on account of the light it throws on the intention of the party, as the intention of the party at one time may be evidence of his intention at a later time. Such declarations, oral or written, must be a part of some act, as of departing, staying away, and the like to avoid creditors.**

Sec. 1847. OTHER DECLARATIONS WHICH ARE CLASSED AS DECLARATIONS A PART OF THE RES GESTÆ.—There are a number of declarations which may be said to fall under the head of declarations which are a part of the res gestæ. These are:

497; 23 R. I. 164; 54 L. R. A. 670. See also, 50 W. Va. 472; 121 Fed. 351.

*41 N. Y. 265; 137 Ind. 519; 135 Ala. 15; 44 Conn. 153.

**145 U. S. 285; 4 M. & W. 267; 67 Ga. 636; 62 Minn. 474.

1. Declarations affecting boundaries, possession and title.

2. Declarations made in the course of official duty.

3. Declarations in the ordinary course of business, or in the discharge of professional duty.

4. Written entries.

These declarations are sometimes treated as separate exceptions to the rule rejecting hearsay evidence.

Sec. 1848. SAME SUBJECT—DECLARATIONS AFFECTING BOUNDARIES, POSSESSION AND TITLE.—When the question arises as to the title, possession, or boundaries of a certain parcel of land, certain statements of the parties are admissible as bearing upon the subject. Where the character of the possession of land is in controversy, the declaration of the party in possession is usually held admissible, as qualifying or explaining such possession, and such declarations are admissible in evidence though the declarant is still living. In some cases the admissibility depends upon whether or not the declarant is dead. In some cases, if he is living, he must be called as a witness. The principle upon which such declarations are admitted is, that the possession of land is an act or condition, and any statement qualifying, explaining or limiting it, is so associated and connected with it as to become a part of the act or condition.

Under the New York rule, the declarations of a former owner, under whom the plaintiff claimed, as to the extent of his boundary or possession, were admitted in evidence as tending to show the extent of his actual occupation, although not then in actual possession, the court holding that as he was the owner he was in constructive possession.*

In another case it was held that the admissions of the holder of the legal title, being against his interests, were competent evidence against him, and was binding upon him and those claiming under him.**

In Massachusetts the rule seems to be that the declarations of deceased persons, made while in possession of land owned by them, pointing out its *boundaries,* are admissible, if no interest to misrepresent appears. The rule does not apply to title, only to boundaries, and while the court observes that most of the decided cases hold that the declarations should be against the party making claim to the title, the rule is not thus restricted in that state.***

By some cases it is held, that if the declarant be shown to have knowledge of the facts which he stated, and made the declaration while on the land or in possession of it, and has since died, the declaration

*36 N. Y. 513. But such declarations would not be admissible, if the declarant, at the time of making them had already sold his interest in the land. 36 N. Y. 477.

**111 U. S. 499; 102 U. S. 333.

***113 Mass. 414; 27 Pa. St. 333.

is admissible.* This is broader than the Massachusetts rule, which excludes every one except owners.

Hence it may be said that the admissibility of such declarations depends upon the following points, all of which have to be investigated from the standpoint of the authorities in the various states or jurisdictions where the question arises: 1. Whether or not the declarant is dead. 2. On what particular point is the declaration offered; is it simply to characterize possession, or to defeat or support title; or does it relate to boundary? 3. Who the particular person is who made the declaration, whether the owner or some other person. 4. If a person other than the owner, whether it can be shown that he had knowledge of the facts, and was upon the land or in possession of it at the time the declarations were made. 5. If the declaration was made by a party in possession, whether he had parted with the ownership prior to making it.

Sec. 1849. SAME SUBJECT—DECLARATIONS MADE IN THE COURSE OF OFFICIAL DUTY.—It is a general rule that entries, or written declarations made by a public officer or a third person in discharge of his duty or perhaps in the ordi-

*102 U. S. 333; 10 W. Va. 59. In Michigan the declarations of a former owner were admitted in disparagement of his title, when the land had passed to his grantee, under a dissenting opinion by Judge Cooley. 38 Mich. 316; 38 Mich. 475. But they cannot be received as evidence of title in favor of the party making them. 70 Mich. 258; 57 Mich. 153; 17 Mich. 351.

nary course of such business are admissible in evidence where they were made at or near the time when the fact recorded took place, are such as are made somewhat regularly, and the party making them has had knowledge of the fact he has recorded, and is not available as a witness, or are authenticated by the oath of the declarant. Thus the statements entered in the books of a county treasurer as to the amounts received by him are admissible as against his bondsmen, where he has defaulted; and the records of a train dispatcher are admissible to show the time of the arrival and departure of a train.*

Sec. 1850. SAME SUBJECT.—DECLARATIONS MADE IN THE ORDINARY COURSE OF BUSINESS.—Declarations made in the ordinary course of business, and at or near the time when the matter stated occurred, are admissible in evidence. It should always appear, when the party making the declarations is acting professionally, that he is acting within the scope of his official duty, as is the case when the party is an agent, co-partner and the like. Such declarations are relevant since they relate to the duty or calling of the party making them. So where the wife is carrying on business, and the business is conducted by the husband for the wife, and in her

*10 Mich. 54; 74 Mich. 714; 18 Pick. 558; 20 Wend. 72; 77 Ill. 18; 56 N. Y. 507; 139 Cal. 410. Weather records kept by the State and the United States are admissible to show the condition of the weather on any particular day. 22 Mich. 231; 64 Mich. 717.

name, his declarations as regards the business are admissible to bind her.*

Sec. 1851. SAME SUBJECT—WRITTEN ENTRIES.—The declarations which we have been discussing are not confined to oral ones, but include written entries, made in the regular course of business, or in the line of official duty. Thus the written entries made in a pass book given to the customers of a bank, are admissible as original evidence to show the amount of deposits at the bank.

The preliminary matters which must be shown to make such entries admissible, are usually: 1. The entry must have been made by the person himself. 2. At or about the time of the transaction recorded. 3. There must be no particular motive to enter that transaction falsely, more than any other. 4. The entry must speak only to that which it was the person's duty or business to enter. 5. It must have been his duty to know the fact to which the entry relates. 6. If a party is living and competent to testify, it is held necessary, in some cases that he be produced.**

*34 Mich. 418; 66 Mich. 390. Such declarations and entries are sometimes said to be an exception to the rule excluding hearsay, and admissible though not a part of the res gestae. In some cases they are only admitted if the person making them is dead or cannot be produced. Elliot on Ev. Secs. 479-480.

**18 Wall. 516; 115 Mass. 167; 19 Me. 317; 15 Pick. 558; 3 Wall. 45; 8 Mich. 476; 68 Mich. 98. But usually the entries are admissible regardless of the death of the party making them. 68 Mich. 98.

Declarations Relating to Bodily and Mental Feelings.

Sec. 1852. WHETHER BODILY AND MENTAL FEELINGS ARE A DISTINCT CLASS OF DECLARATIONS OR A PART OF THE RES GESTÆ.—It may be asked whether declarations relating to bodily and mental feelings are anything more than a part of the res gestæ? What is the ground for making a distinct class of them? The rule governing their admission as a distinct exception to the hearsay rule, is as follows; whenever it is material to inquire into the demeanor, conduct, or the bodily or mental feelings of an individual at a particular time, the expressions used by the individual at the time in question are in the nature of original evidence.

The grounds of admission of such declarations are said to be:

1. They are the thing itself which is inquired into so far as conduct is concerned.

2. They furnish satisfactory evidence, and often the only proof, of bodily or mental feelings.

3. They are said to derive their credit from being usually identified with, or naturally resulting from, particular corresponding feelings.

Now, as to their deriving credit from particular corresponding feelings, this cannot be known unless there is some outward act which corresponds to these declarations. Then the declaration is the only proof, and it becomes important to know whether it can be

admissible as a part of the res gestæ in the case. If the issue is made up, and it seems relevant to inquire into the demeanor of the individual at a particular time, expressions used by the individual at that time are admissible. But they are to be rejected in all cases, unless they are brought within the rule as declarations as a part of the res gestæ. Hence it is generally said that complaints or exclamations as to present suffering are admissible, but the statement must not be a narrative of a past transaction or suffering.* The question often arises as to the health of a person at the time of taking out an insurance policy, the applicant being required to state his condition of health and freedom from certain diseases, and it is held that contrary statements or declarations by the insured about the time as to being in poor health or suffering from disease would be admissible against the claimant on an action brought on the policy.**

In several New York cases upon the subject of the admissibility of declarations as to bodily and mental feelings, it is held that to be a part of the res gestæ and admissible, such declarations must be a part of something done, or of some fact relating to a condition, and such condition must be evidenced by some external sign, symptom or act.***

*92 Mich. 412; 92 Mich. 610.

**Amison v. Kinney, 6 East, 182; Ins. Co. v. Mosley, 8 Wall. 397.

***Swift v. Life Ins. Co., 63 N. Y. 186; 67 N. Y. 186; 69

It is sufficient to admit the declarations if the person assumes the attitude of some ailment, as where an injured person makes an exclamation of pain when touched or handled by a physician, such declarations or exclamations are admissible.* It is sometimes claimed that the declarations are not admissible unless made *ante litem motam,* or before the suit is brought, or before the beginning of the controversy. But such declarations are admitted by some courts though made after suit brought, on the ground that there was no sufficient reason for their exclusion that

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N. Y. 56. See also, 52 Mich. 214; 76 Mich. 237; 68 Minn. 55; s. c. 37 L. R. A. 199; 145 U. S. 285; 154 Ind. 655.

In Elliot on Ev. Sec. 519 the rule is thus stated: "When the physical or mental condition or the intention of one is relevant and material to be proved, then declarations or usual expressions showing such physical or mental condition or such intention are admissible. In all these declarations it makes no difference whether the person who made them is dead or alive since death is not a prerequisite to admissibility. Whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party. But when the intention is important only as qualifying an act, its connection with that act must be shown, in order to warrant the admission of declarations of intention. If the existence of a particular intention of a person at a certain time is a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact as his own testimony that he then had that intention would be." Citing, 145 U. S. 285; 188 U. S. 208; 157 Mass. 180; 23 Ohio St. 146.

*16 Mich. 180. See also, 33 Mich. 49; 53 Mich. 323.

would not apply to declarations made before the controversy was started.*

The declarations are not of any more importance if made to a physician than to a layman, provided they are made in such a manner to be admissible as evidence. The declaration, whenever made, must be as to an existing pain, or present state of feelings, and not as to pain or feelings five minutes, or any period prior to the statement.**

Sec. 1853. EXTENT TO WHICH THE WITNESS MAY INTERPRET THE DECLARATIONS HEARD BY HIM.—The question arises as to how far the witness may go in interpreting the declarations which he heard? Thus it may be desired to ask the witness what an outcry heard at a certain hour of the night indicated as to the state of mind of the party uttering it. Such questions have been held improper, but the witness is allowed to describe the nature of the outcry, and the jury is to determine therefrom for itself as to what the outcry meant or indicated.***

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*38 Mich. 537; 66 Barb. 125; 11 Allen 322; 131 Mass. 576. Declarations as to bodily or mental feeling are not held to be incompetent on account of mere lapse of time between the receiving of the injury and their being made, since while they may be false, they are not any more so than those made before, and such declarations tend to show the permanence of the injuries received.

**99 Mass. 88; 13 L. R. A. 465; 120 Ia. 147; 129 Pa. St. 113; 134 Ind. 380; 61 Minn. 31; 80 Mich. 237.

***45 N. Y. 1.

Sec. 1854. STATUTES PERMITTING PARTIES TO TESTIFY ARE HELD TO CHANGE THE RULE AS TO THE ADMISSION OF DECLARATIONS IN SOME JURISDICTIONS.—In some jurisdictions the fact that the statutes have changed the common law rule by permitting parties to testify in their own behalf is held to change the rule as to admitting declarations of mental and bodily feelings, making them inadmissible, unless made to an attending physician.* But this is not the general rule as to the effect of such statutes.**

DECLARATIONS RELATING TO PEDIGREE.

Sec. 1855. MEANING OF PEDIGREE.—The word "pedigree" is used in a comprehensive sense. It embraces not only the question of descent, but also the question of relationship, which is closely allied thereto; and also the facts of the birth, marriage and death, and the times of these events, either absolutely, or relatively to each other, when they become important for the purpose of ascertaining pedigree, or to trace relationship.***

This class of declarations is clearly outside of what is meant by hearsay evidence. On all of these questions it becomes important to know what is the tradition of the family; and what is the history of the particular individual about whom these questions are raised.

*105 N. Y. 294; 132 N. Y. 228; 93 Ga. 362.
**158 U. S. 271; 115 Ind. 544; 69 Vt. 175.
***171 N. Y. 166; 77 Pa. St. 507; 17 Md. 49.

How has he been treated or acknowledged by others who sustain towards him any particular relationship?

Sec. 1856. OF THE QUALIFICATION OF THE DECLARANT TO PEDIGREE.—What relationship must the declarant sustain to the person whose pedigree is in question to make his declarations admissible in evidence? The weight of authority is that the declarant must be legitimately related by blood, or connected by marriage, with the person to whom the declaration relates. And this relationship or connection must be shown by evidence outside of the declaration. A few states go farther than this.*

As to the character of the declaration, it may express the personal knowledge of the declarant; or information given him by other persons qualified to be declarants; but not information received by him from persons not qualified to be declarants. Thus a declaration of a brother on the strength of what his older sister had told him would be admissible.

Sec. 1857. THE RULE ADMITTING DECLARATIONS RELATING TO PEDIGREE STATED. —"Declarations of a deceased person are admitted in cases of pedigree, that is, when they relate to the existence of any relationship between persons, whether living or dead, or to their birth, marriage, death or legiti-

*The rule as to relationship of the declarant cannot be considered fully settled. In England the declarations of friends and neighbors have been admitted. 13 Ves. 514; 2 Bing. 89. See also, 2 Tenn. Chan. 216; 3 Wall. 175.

macy, when the declarant is shown to be legitimately related by blood to the person to whom they relate, or the deceased declarant is the husband or wife of such person so related, and when the declarations are made ante litem motam, that is, before the controversy in relation to which they are to be proved arose."* A broader rule prevails in some jurisdictions.

Sec. 1858. GROUNDS UPON WHICH DECLARATIONS AS TO PEDIGREE ARE ADMITTED. —The principle, or grounds upon which such declarations are admitted are stated by Greenleaf to be, the interest of the declarant in the person from whom the descent is made out, and from consequent interest in knowing the connections of the family. Mr. Best observes that the extreme difficulty of securing any better evidence, compels the reception of this, when it comes from persons most likely to be acquainted with the truth, and under no temptation to misrepresent it. Again, it is said that the admission of these declarations rests upon the supposed accuracy of impression, where accuracy is of general interest, and where family pride, family discretion, and conflicting views and interests assist in the correction of any mistake.** Therefore, we may say that the interest the declarant has in knowing the connection of his own family; the accuracy of impression, where accuracy is of general

*Elliot on Ev. Sec. 361, citing, 123 Ala. 35; 77 Ind. 236; 114 Ia. 29; 117 U. S. 389; etc.

**71 N. Y. 423; 13 Ves. 140; 160 Ill. 263; 117 U. S. 389; 76 Me. 306.

interest in the family; and the difficulty of securing any better evidence, all bear upon the adoption of the rule.*

Sec. 1859. LIMITATIONS UPON THE ADMISSION OF DECLARATIONS CONCERNING PEDIGREE.—The usual limitations upon the admission of such declarations are: 1. The declarant must be dead. 2. The declarant must be a legal relative by blood or marriage. 3. There must be no ulterior motive or desire actuating the declarant to make a false statement. In addition to these the declaration itself must be relevant to a matter of pedigree; the proof of the declarations must come from qualified persons, and the declarations must have been prior to the bringing of the suit in which they are desired to be used, though they need not be in any particular form.**

*"These matters are from members of the family, persons having such a connection with the party to whom they relate that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken." Elliot on Ev. Sec. 362.

**16 Gray, 174; 113 Mass. 151; 7 H. L. 633; 10 Pet. 412; 42 Mich. 206; 37 Mich. 410. The record of baptism, when admissible, is evidence of the baptism, but is not evidence of the date of birth, although the date of the birth is also entered. 61 Mich. 471. A person may testify regarding his own age. 34 Mich. 296; 64 Mich. 671. It is said that the entry of each child's birth, though contained in a public register, is not evidence as to the time of the birth, unless it can be proved that the entry was made by the direction of the father or mother, and therefore to be received as the declaration of one of them.—Starkie on Ev.

DECLARATIONS OF DECEASED PERSONS AGAINST INTEREST.

Sec. 1860. WHAT IS MEANT BY DECLARATIONS AGAINST INTEREST?—Declarations against interest are said to be statements or entries made by parties which are at variance with their interest, and tend to destroy or diminish some pecuniary or proprietary right, of the one making the statement, or tending to impose upon him a pecuniary liability.* Such declarations are admissible after the death of the declarant though not a part of the res gestae, and although the party making the statement or entry was in no way connected with the parties to the action. So that they form a true exception to the hearsay rule.

Sec. 1861. RULES GOVERNING THE ADMISSION OF DECLARATIONS AGAINST INTEREST.—The rules governing the admission of declarations against interest are as follows: 1. The declarant must be dead. 2. The declaration must be disserving or against the interest of the declarant; that is, opposed to his pecuniary or proprietary interest. 3.

*74 Ala. 64; 87 Minn. 18; Elliot on Ev. Sec. 434. Declarations against interest are distinguishable from admissions and confessions in that they are made by strangers to the action, against their interest, and not declarations made by a party or privy against his own interest, and therefore received as direct evidence of the facts declared. Admissions are generally declarations of parties and those identified in interest with parties and the declarant may or may not be dead. Declarations against interest need not be made in the regular course of business, or be contemporaneous with the act recorded. Elliot on Ev. Sec. 435.

The declarant must have possessed competent knowledge of the facts, or at least it must have been within the line of his duty to know them, or the circumstances should have been such that he may be presumed to have known them. 4. The adverse interest of the declarant must appear either from the very nature of the case, or from extraneous evidence. It cannot be proved by the declaration itself. 5. Such declarations may be oral or written.

1. Upon the point that the declarant must be dead, it has been held that equivalent disability of the declarant does not render this class of declarations admissible. But it is said that the rule will undoubtedly yield in this respect, there being no reason why the previous declaration of a person who has become insane should not be received in evidence, the same as though he were dead.*

2. As to the declaration being disserving or adverse to the interest of the declarant. It is said that this must be a pecuniary or proprietary interest.** And the adverse interest should be evident from the nature

*10 Conn. 8; 78 Ala. 222; 16 Iowa, 81. In 8 Leigh (Va.), 697; and 10 Conn. 8, there is a tendency to admit the declarations when the declarant is absolutely incapacitated.

**11 Cl. & F. 85; 16 M. & W. 497; 120 Ia. 121; 75 Va. 522; 41 Minn. 245. A statement is said to be against pecuniary interest when it tends to lessen the pecuniary value of property of the declarant, or imposes upon him pecuniary responsibility. It is against proprietary interest when its tendency is to cast doubts upon the ownership of the property by the person making the declaration. Elliot on Ev. Sec. 441.

of the case or from other proof, but it is sufficient if the declaration was adverse at the time it was made.*

3. As to the declarant having competent knowledge as regards the matter to which the declaration relates it is said, that the want of knowledge goes not to the admissibility but to credulity.** But in a case where the declarant's duty does not require that he know the matter to which the declaration relates, it will be rejected.***

Sec. 1862. GROUND OF ADMISSIBILITY OF DECLARATIONS AGAINST INTEREST.—The ground of admissibility of this class of declarations is on the extreme improbability of their falsehood. This makes the fact that such declarations are against interest of prime importance. The accuracy and completeness of judicial evidence is supplied by the circumstances of the case. The statement being excluded in the lifetime of the declarant, would add to the likelihood of its truthfulness. Again, such declarations are often the only mode of proof available, and are admitted on account of the inconvenience that would result from their exclusion.****

Sec. 1863. HOW FAR DECLARATIONS AGAINST INTEREST MAY INCLUDE COLLATERAL MATTERS.—A declaration against interest is evidence of collateral matters therein stated,

*41 Upp. Can. Q. B. 361.
**1 C. M. & R. 18.
***10 Ohio St. 418; 65 Vt. 205; 23 Ill. App. 58.
****2 Pick. 532; 45 Minn. 71.

though such collateral matter be not against the interest of the declarant, provided, that such collateral matters are so connected with the declaration that they may be made a part and parcel of it, they are admissible.*

It may be said generally, that a written entry by which a man discharges another of a claim which he had against him, or charges himself with a debt to another, is evidence of the fact which he so admits against himself. There being no interest of his own to advance by such an entry, if the matter is relevant, the entry would be admissible in a suit between other parties. The question has arisen where the entry debits the writer with an amount received, and then credits himself with the same amount paid out, whether such entry is admissible to discharge the party making it? The entry has been held admissible to discharge the party making it when the entry was made as a whole, and the parts were inseparable. Such declarations will be admitted though oral.**

DYING DECLARATIONS.

Sec. 1864. MEANING OF DYING DECLARATIONS.—Dying declarations are explained to be state-

*10 East, 109, in which case Lord Ellenborough admitted the entry of a deceased mid-wife in his book as to the birth of a person, the mid-wife having attended the mother, and the entry contained a charge for the attendance, and the notation that it was "paid." The word "paid" making the entry admissible as against interest.

**L. R. 3 Ch. Div. 605; 158 Pa. St. 521; 31 N. Y. 115; 10 Barb. 202; 15 East, 32; 1 Wharton on Ev. 226.

ments made by a person since deceased, and made while under the conviction of impending death, pertaining to the cause, material facts and circumstances of the injury from which the declarant fears death, and does die. They usually constitute an accusation against some one as being responsible for the injury.*

Sec. 1865. WHEN DYING DECLARATIONS ARE ADMISSIBLE.—Dying declarations are an exception to the rule rejecting hearsay evidence in that while such declarations are not made under oath or tested by cross-examination they are admitted. They are admissible under the following qualifications or limitations:

1. Such declarations are receivable only in cases of homicide; that is, for the murder or manslaughter of the declarant; and never in civil cases.**

2. The death of the declarant must be the subject of the inquiry; and the circumstances of the death the subject of the dying declaration.***

3. The declarant must be actually in extremis, that is, actually at the point of death.***

4. The declaration must have been made under

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*Elliot on Ev. Sec. 332; 146 U. S. 140; 102 Ala. 135.

**1 M. & W. 614; 165 Mass. 174; 146 U. S. 140; 31 Pa. St. 198; 80 Ind. 338.

***41 Kan. 115; 26 Mich. 112; 137 Mo. 125; 35 Ohio St. 78; 53 Vt. 560.

****99 Ala. 180; 92 Md. 222; 48 Mich. 474; 47 Ohio St. 358.

the present apprehension, on the part of the declarant, of impending death.*

5. The declaration is admissible only to those things which the declarant would have been competent to testify, if sworn in the cause.**

6. The interval of time between the uttering of the declaration and the moment of death, is not material upon the question of admissibility, if it appears that it was made under a sense of impending death.***

7. The form of the declaration is unimportant. It may be verbal or written. It may be voluntary, or in answer to questions; and the substance of the declaration need only be given.****

Sec. 1866. REASONS FOR THE ADMISSION OF DYING DECLARATIONS.—These dying declarations do not take their credit and force as testimony so much from the declarant's statement as they do from the peculiar circumstances and surroundings under which the statement was made. One of the reasons for admitting these declarations in criminal cases is, that it seems absolutely necessary so to do, in order to bring a manslayer to justice, since the killing may take place when there is no one present, and the

*150 Ill. 66; 101 Mo. 464; 108 Mass. 296; 109 Pa. St. 541.

**80 Ind. 388; 24 Ore. 61; 154 Ind. 630; 9 Tex. App. 619.

***68 Ala. 502; 120 N. Car. 601; 11 Cox C. C. 316; 121 Mo. 537.

****33 La. Ann. 237; 55 Kans. 135; 113 Ala. 7; 11 Cush. 417; 78 Ky. 380; 24 Cal. 26; 11 Cush. 417; 47 Ohio St. 358; 111 N. Car. 695.

dying declarations may be the only evidence sufficient to convict.*

DECLARATIONS RELATING TO MATTERS OF PUBLIC AND GENERAL RIGHTS.

Sec. 1867. WHAT IS MEANT BY DECLARATIONS OF PUBLIC AND GENERAL INTEREST.—The term "public" is applied to that which concerns all the citizens, and every member of the state; a right is therefore public if it is common to all. The term "general" is applied to a lesser, though still a larger proportion of the community. A right or custom may be said to be general if it is common to any considerable number of persons; as to the inhabitants of a county, or of any particular district. The term interest refers either to a pecuniary interest, or some matter by which legal rights or liabilities are affected.**

Sec. 1868. RULES GOVERNING ADMISSIBILITY OF DECLARATIONS AS TO MATTERS OF PUBLIC OR GENERAL INTEREST.—The admissibility of this class of declarations is governed by the following rules:

1. The declarant must be dead.

2. Declarations relating to matters of public rights are admissible, coming from any member of the public.

3. Declarations relating to general rights or interests are admissible, coming from a particular member

*Woodcock's Case, Leach, (4th ed.) 500; Thayer's Cases on Ev. 353-4.

**4 El. & Bl. 535.

of a district or community where the existence of the right or interest to which the declaration relates is in question, if it appears that the declarant knew the facts, or was in a position to know them, or that the declaration raises a natural and fair inference that he must have known them.

4. The declaration must have been made before the commencement of the controversy, that is, ante litem motam.

5. The declaration may be made in any form or manner.

Facts of private interest or importance cannot be proved in this manner, but it is sometimes difficult to draw the line between what are private and what public in nature.*

Sec. 1869. GROUNDS OF ADMISSION OF THESE DECLARATIONS.—The grounds of admission of declarations as to public or general interest are: 1. The necessity of the case. 2. The fact that the universality and notoriety of the interests concerned, remove the temptation and the ability to misrepresent, which would arise if such evidence were received in matters of purely private and personal concern.

While the declaration must come from some one having knowledge of the facts, this knowledge is always presumed where the matter is of public in-

*10 Pet. 412; 48 Conn. 504; 113 N. Car. 537; 145 Ill. 559.

terest. In case of general interests there must be some knowledge outside of the declaration to show that the declarant had knowledge of the fact to which the declaration relates, or to have been in a position to know them. In England these declarations have been received to determine manorial customs; the boundaries between countries, parishes or manors; as to the right of a corporation to collect toll on a public road, and the like. In this country they have been admitted as to the name of a stream; to fix the true head of a creek, and the like.*

REPORTED TESTIMONY AND CERTAIN DECLARATIONS UNDER OATH.

Sec. 1870. WHEN THE TESTIMONY OF A WITNESS GIVEN ON A FORMER TRIAL SHOULD BE READ IN EVIDENCE ON A SUBSEQUENT TRIAL.—It is a general rule of long standing that what a witness has said may be given in evidence either from the judge's notes, or from notes taken by any other person who will swear to their truth. But to admit such testimony the following things are necessary:

1. The trial must be between the same parties.

2. The death of the witness must have taken place.

3. The preservation of the testimony, either in

*1 Johns. 156; 7 C. & P. 181; 10 M. & W. 218.

some written form, or in the memory of some person.*

There are now some qualifications as to the death of the party. This testimony is received in some of the United States, where the existing circumstances are practically the same as the death of the witness; and perhaps the weight of American authority favors the admission of such testimony when the witness is out of the jurisdiction, or cannot be found, or is insane, or sick, or is unable to testify, or has been summoned to appear and is kept away by the adverse party.**

This class of testimony is now commonly received. The requirement as to the suit being between the same parties, does not necessarily mean parties of precisely the same nominal identity. Thus, where a witness testified in a suit in which A and several others were plaintiffs against B alone as defendant, testimony would be admissible after the death of the witness, in a subsequent suit relating to the same matter, brought by B against A alone.*** So that the testimony is admissible not only against the same party in the former suit, but also against those who are privy to him in estate, in blood, or in law.****

*Per Lord Mansfield, in 3 Taunt. 362.

**98 U. S. 155; 87 Mich. 400; 36 Vt. 142; 69 Me. 400; 158 Ind. 174. In criminal cases, the same person must be accused upon the same facts, to admit such testimony. 5 Denio, 370.

***13 How. 307; 34 Ill. App. 523; 75 Ala. 262; 73 Iowa, 399.

****53 Ind. 143; 5 Denio, 370; 112 Mass. 267; 41 Pa. St. 102.

It is not necessary to give the precise words of the witness. It is held in Massachusetts that the substance of the testimony is not sufficient, but that the substance of the language must be given.* If the witness gives the substance, though using his own language, it is usually sufficient.**

It is not necessary that there should be any particular method of preservation of the testimony given on the former trial. It may be given from the notes of the judge; or from the notes of one of the counsel; or from the notes of the stenographer. But in any case there must be evidence that the notes have been correctly taken.*** If the witness is not dead, but is without the jurisdiction of the court, it should be shown that an effort has been made to get him as a witness in the case.****

DECLARATIONS RELATING TO ANCIENT DOCUMENTS AND MATTERS.

Sec. 1871. MEANING OF ANCIENT DOCUMENTS.—Ancient documents are documents which are over thirty years old. They include, deeds, leases, powers of attorney, wills, bonds, receipts, letters, and the like.***** The thirty years which makes the document ancient is computed from the time the document is executed; except that in some cases wills are held to

*2 Metc. 251; 127 Mass. 354.

**97 U. S. 693; 5 McClain (U. S. C. C.) 296.

***27 Mich. 454; 9 U. S. 693; 27 Pa. St. 30; 45 Cal. 137.

****44 Mich. 246; 47 Mich. 10; 56 Mich. 586.

*****1 Blackf. (Ind.) 157; 105 Mass. 351; 9 Pet. 62; 73 Ill. 109.

date from the death of the testator rather than from the date of the instrument.* The time is computed from the date of the instrument up to the moment it is offered in evidence.**

Sec. 1872. WHEN SUCH ANCIENT DOCUMENTS WILL BE ADMITTED IN EVIDENCE.—Documents over thirty years of age, coming from the proper custody, will be admitted in evidence, when either possession under them is shown, or some other corroborative evidence of their authenticity is produced. And perhaps such documents are admissible if nothing is shown to create a suspicion that they are not genuine.*** Such documents are admitted on the ground that it would be practically impossible, in most instances to prove their execution on account of their antiquity; and their being spurious is very unlikely from the circumstances of their proper custody, appearance, and presentation in a public trial.****

Sec. 1873. ANCIENT DOCUMENTS TO BE ADMISSIBLE MUST COME FROM PROPER CUSTODY.—The chief limitation upon the admissibility of ancient documents is that they must come from the proper custody. Proper custody is a question for the determination of the court from the facts and circumstances of the case. It is considered as

*6 Barb. 109; 3 Johns. (N. Y.) 292; 6 Binn. 439.

**181 Ill. 529; 58 Tex. 567.

***1 Starkie, Ev. Sec. 330; 7 Wend. 371; Elliot on Ev. Sec. 423; 4 Wheat. 213; 47 N. J. Eq. 365.

****74 Conn. 374; Elliot on Ev. 424.

coming from proper custody, if the document is produced by a person whose connection with the property in litigation is such, that the possession of the document would naturally fall to him.*

*Bell v. Brewster, 44 Ohio St. 690; 16 Me. 27; 139 Mass. 244; 79 Ky. 373.

CHAPTER III.

ADMISSIONS.

Sec. 1874. TO WHAT CLASS OF EVIDENCE DO ADMISSIONS BELONG.—In the last chapter the rule that the best evidence must be produced has been considered, as well as the rule excluding hearsay. It was seen that as a general rule hearsay evidence is not admissible, but that there were many so-called exceptions to the rule excluding hearsay. But whether the rules discussed are real "exceptions" to the hearsay rule or not does not matter so long as it is understood that certain kinds of evidence is admissible notwithstanding it appears to be second-hand. By some authors admissions are also treated as exceptions to the rule excluding hearsay, by others they are treated as primary evidence. Mr. Best treats admissions under the head of "Mode of Proof," and evidently regards them as primary evidence. Wharton treats admissions as things to be proved, rather than as a mode of proving a fact. And it would seem that an admission is both a thing to be proved and a mode of proving the thing or matter in question.

An admission is receivable in evidence because of the relation and attitude which the person who makes it, sustains to the party to the suit or the question at issue. Thus, where a party admits to a third person

that he owes a debt to another, such admission is admissible in a suit to recover judgment for the debt, though made extra-judicial, because of the relation of the party making it to the matter in issue. When such an admission is proved the jury may use it to determine the ultimate fact in issue, that is, the indebtedness of the party to the other.

The principle upon which these admissions are received in evidence is based chiefly upon the reasonable presumption of the truth of the statements made, when it is against the interest of the person who makes it. If the admission is in favor of the party who makes it, it is not receivable in evidence unless brought within some of the other rules, as, for example, declarations which form a part of the res gestae; in such a case it is admissible whether it is for or against the party making it. Admissions are sometimes said to be receivable upon mixed grounds, as because of some privity with the declarant, and partly because the admissions form a part of the res gestae, or are against the interest of the party making them.*

Sec. 1875. WHO MAY MAKE BINDING ADMISSIONS.—The admissions of a party are binding in the following instances:

1. The admissions of a party to the record against himself, are *always* binding.

2. The admissions of the real party in interest, or

*73 Mich. 78; 162 Mass. 458; 77 Va. 250.

who has a substantial interest, whether he be a party to the record or not.

3. The admissions of a nominal party to the record, who sues as trustee for the benefit of another.

4. The admissions of a party who is identified in interest with the party to the record.

As to the first class of binding admissions, those made by a party to the record, the application of the rule is not difficult.* As to the second class it may be said that it is not so frequent under the code practice as at the common law, for the reason that under the code the suit is brought in the name of the real party in interest, while at common law this was not always true, as the suit was frequently brought in the name of the party who had the legal title, though he was not really the party in interest. As to the third class, in cases of admissions of nominal parties to the record other than parties suing as trustees, if such nominal party has parted with his entire interest, and the admission is made after the transfer, it cannot defeat the interest of the assignee, and the admission is not binding upon the real party in interest. But if the nominal party is trustee, and sues in the capacity of another, then his admission is receivable.**

*53 Mich. 107; 1 H. & N. 1; 6 M. & W. 664; 26 Wis. 295; 64 Pa. St. 454. But the mere statement that a party will claim no damages, is not an admission that he has not been damaged. 160 Mass. 486; 31 Ala. 689.

**93 Ill. 39; 5 Mich. 60. But, see, 4 Conn. 544; 10 Ill. 67; 33 Me. 360.

Where there are several parties to the record—several defendants—represented by the same or different attorneys, the admission of one defendant while it will bind him, is not to be considered as binding the other defendants, unless their interests are joint.* The existence of a common interest between such defendants, as in the case of executors, will not make the admissions of one binding upon the other or others. So the admission of one co-tenant will not be received as against the other. And while the admission of one having a joint interest is admissible to bind the others jointly interested with him, such admission is not to be admitted as bearing upon the question of the existence of the joint interest. Whether the admissions of a co-partner, made after the partnership is dissolved, is to be received in evidence as binding upon the other co-partners as to things transpiring when the co-partnership was yet existing, is in conflict.

Admissions as to matters of fact made at the trial of a case in one court by counsel for the parties, are not always binding when the case is carried into another court.** And admission upon the trial of a case as to points of law, are not binding upon any one. It is the duty of the court to determine the effect of the law, and the admissions of attorneys are in no way binding.***

*21 Pick. 243.
**26 Mich. 385.
***45 Mich. 29; 10 Mich. 125.

Sec. 1876. WHEN THE ADMISSIONS OF STRANGERS ARE ADMISSIBLE IN EVIDENCE.—The admissions and declarations of strangers and third parties are in some cases receivable. The rule in regard to the admission of such testimony is: When the mutual rights of such third persons at a particular time are important and material to determine the question in issue, the admissions of such third person in reference to such rights are receivable in evidence, though he is a stranger to the suit, or not a party to the record.* In such a case such evidence in general is receivable as would be legally admissible in an action between the third persons themselves; or between one of the third persons and one of the parties to the suit.**

Entries in the books of a bankrupt, made before the bankruptcy took place, are receivable in evidence to prove the condition of the creditor's debt, or the state of the bankrupt's affairs. But admissions made after the bankruptcy are not admissible for this purpose, but are received against himself only.***

Sec. 1877. ADMISSIONS OF HUSBAND AND WIFE.—Notwithstanding the close relations of husband and wife, the admissions of the wife are not binding upon the husband unless an authority can be shown or is inferred. Neither will the admissions of the husband bind the wife. Where the wife usually

*2 Esp. 695; 136 Ind. 680; 18 W. Va. 299.
**25 Conn. 499; 108 Ga. 507.
***54 Mich. 500. See also, 8 Wall. 480; 37 Me. 59.

conducts the business in reference to which an admission is made by her, it may create an inference of authority from the husband. But the authority of the husband must be shown to have been express, except in cases where they fall within the scope of the usual and customary things which she may be reasonably presumed to have authority to do.* The husband, at common law, was entitled to the wages of the wife, and was therefore not bound by her admissions of payment being made to her.

Sec. 1878. ADMISSIONS OF ATTORNEYS.—Admissions made by an attorney in the trial of a cause to obviate the necessity of proof of facts, are binding upon the client. An attorney, in the trial of a cause for a client, is the agent of the client with very broad powers. So all agreements and stipulations signed by the attorney as to the suit are binding upon the client.** But unless the admissions pertain to the matter in controversy they cannot be admitted.

Formal statements made by an attorney on the trial of a cause, and admissions made in court may generally be shown upon a subsequent trial of the same cause, unless they were limited to the particular trial; but are not usually admissible in another action, or in an action between the client and a stranger.***

*115 Mass. 578; 33 Mich. 35; 155 Pa. St. 572; 98 Ala. 635; 15 Conn. 347.

**41 Mich. 433; 28 Kans. 394; 148 Mo. 291; Elliott on Ev. Sec. 256; 124 Mass. 185.

***40 Conn. 313; 32 Mo. App. 657; 75 Tex. 111.

Sec. 1879. IMPLIED ADMISSIONS.—The form of an admission is largely immaterial as regards its competency; they may be express, as in words or writing; or be implied from assumed character, acts or conduct, and even from silent acquiescence where there is a duty to speak. Thus where any domestic or official relation is recognized by an admission, such admission is evidence against the person making it that such relation exists. The dealing with and recognizing a person as an officer, is prima facie evidence of the person being such officer as against the person so dealing with him. The same is true of a person dealing with a body corporate, such person cannot deny the existence of the corporation, though none in fact exists.* So if a party have books and documents bearing upon the issues in a case, and fails to produce them it is deemed an admission that they contain matters unfavorable to him.**

Admissions may not only be implied from active conduct, but also from tacit or apparent recognition, and even when there is nothing done. Thus if statements are made in the presence of a party, which if not true, fairly call for some denial, and no denial is made, evidence of these facts is receivable as admissions against the party in whose presence they were made.

*38 Mich. 779. The payment of interest or part of a debt, is a prima facie admission of indebtedness. 40 Ia. 188; 16 Ind. 136.

**115 Mass. 410; L. R. 5 Q. B. 314. See also, 53 Mich. 437; 41 Mich. 119. A tender of payment admits a liability to the amount of the sum tendered. 78 Ill. 429; 45 Wis. 200.

This rule depends upon the facts being such as to make a denial necessary, if it was apparently such a falsehood as to deserve nothing but contempt, it would not need to be denied.* Such statements must also appear to have been fully understood by the party, and he must have had an appropriate time to make a denial. If the party was asleep or intoxicated, or the statement was made by a minister in church where the party could not with propriety deny it, he would not be bound by it as an admission.**

Letters from third persons addressed to a party and found in his possession are not evidence against him as to the matters therein stated, unless the contents have been received, adopted or sanctioned by him by some reply, statement or act as shown by evidence other than the received letters themselves.*** So though the letter fairly calls for a reply if its contents were thought false, it is not admissible unless there was a duty to reply.****

Sec. 1880. OF ADMISSIONS CONTAINING HEARSAY.—The authorities are in conflict as to whether admissions containing hearsay are to be admitted in evidence or not. It is said that if an admission contains matter which is stated as a fact, such

*24 Mich. 479; 28 Mich. 336.

**39 N. Y. 39.

***3 C. & P. 203; 47 Mich. 359; 9 C. & P. 221.

****97 N. Y. 1; 126 N. Y. 410; 4 Allen, 125; 26 Fla. 523. If the letter is answered both letters become admissible. 1 Cush. 189; 104 Ia. 269.

statement of the fact is evidence of the fact against the person who makes the statement, though the statement is made upon information. A distinction being made between what is stated as a fact and what is stated as hearsay, allowing the former and rejecting the latter.*

Oral admissions may be introduced to prove the contents of a writing where the law does not require written evidence of the fact. Thus the admissions of a party on the trial that a letter purporting to be a copy of the original, was a true copy of the original letter, would dispense with the production of the original.**

In New York it is held that the admissions of a party are only competent where oral evidence could be introduced, that is, a record could not be supplied by an admission. The rule being, that before parol evidence is admissible of the contents of a written docu-

*22 Wis. 118; 26 Wis. 395. See also, 16 N. Y. 381.

**8 Gray, 558; 62 Pa. St. 374; 34 Ohio St. 581; 66 Me. 232; 6 M. & W. 664. In the last case it was said, "Whatever the party says, or his acts, if they amount to an admission, are evidence against himself, though such admissions involve what must necessarily be contained in some deed or writing. An admission of a party, or one under whom he claims, that the estate has been conveyed to or from such person, or that such person filled the character of the assignee, which could only be proved by deed or writing, is admissible against himself." The reason given for the admission of such parol statements without notice to produce or account for the absence of the original instrument, is that they are not open to the same objection which applies to oral evidence from other sources where written evidence might have been produced.

ment in the possession of the other party, it is first necessary to give notice to the other party to produce such document. If it is not produced after notice given, then oral evidence is admissible to prove it, and admissions would likewise be admissible under the New York holding.

Sec. 1881. ADMISSIONS NOT GENERALLY CONCLUSIVE.—The effect of an admission is generally open to contradiction by proof. And admissions are only conclusive where the admission has been acted upon; and then only between the party making the admission and the party whose conduct has thus been influenced. It is of no consequence in such a case whether the admission is true or false. An admission may be made either by conduct or by express language, and the conclusive character of it comes from the fact that it has been acted upon. Where it can be withdrawn before it has been acted upon, and without a breach of good faith, then it is not conclusive. Thus all the authorities hold that if A stand by and sees B sell his horse to C, without making any objection, it is a conclusive admission of A that the horse belongs to B, or that he has authority to sell it, though in fact the horse belongs to A. The same rule applies to the sale of land in some states, and is denied in others.*

Sec. 1882. ADMISSIONS MADE UNDER DURESS, OR FOR THE PURPOSE OF COM-

*34 Mich. 384.

PROMISE ARE NOT RECEIVED IN EVIDENCE.—There are two classes of admissions that are not receivable in evidence. These are:

1. Admissions made under duress, that is, under the force of illegal restraint or compulsion. Such admissions cannot be received in evidence. The constraint must be shown to have existed at the time of making the admission. The mere putting of the party in jail by authority of law would not constitute duress. Duress includes threats, and is sufficient if the freedom of the will is effected.

2. Admissions made for the purpose of compromise, or for negotiating a compromise to settle litigation are not to be given in evidence. To make an admission come within this exception it is not necessary to state in terms that the offer is for the purpose of compromise. If it appears that it is so, it is sufficient, and all reference to it is barred on the trial of the cause.* But admissions of a collateral or indifferent fact not connected with the merits of the case, are receivable, though made pending a compromise. And so, also, if it is an independent admission of a fact, merely because it is a fact.**

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*101 U. S. 263; 39 Mich. 274.

**22 Kan. 639; 52 N. H. 287; 64 Mich. 59; 49 Vt. 93.

CHAPTER IV.

THE EVIDENCE MUST BE RELEVANT TO THE ISSUE.

Sec. 1883. MEANING OF THE TERM "RELEVANT."—The word "relevant" as applied to testimony means that it directly touches upon the issue which the parties have made by their pleadings, so as to assist in ascertaining the truth in regard to it.* To be relevant, however, it is not necessary that the evidence bear directly upon the point in issue, as it is sufficient if it is but a link in the chain of evidence tending to prove the issue by reasonable inference, and is logically related to the fact in issue.**

The word is used in most of the text books, but is sometimes replaced by the word "material." So the words "competent" and "relevant" are sometimes used interchangeably by the profession.***

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*78 N. Y. 90. "Of all the rules of evidence the most universal and the most obvious is this—that the evidence adduced should be alike directed and confined to the matters which are in dispute, or which form the subject of investigation."—Best Ev. Sec. 251.

**82 N. Y. 339; 92 U. S. 281; 159 Mass. 514. "The word 'revelant' means that any two facts to which it is applied are so related to each other that according to the common course of events one or either of them taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other."—Stephen's Dig. Ev. Art. 1; 63 N. H. 580. Wharton's Ev. Sec. 20.

***Greenleaf says: "Competent evidence is that which the

The object of pleading is to lead to an issue of fact or law affirmed on the one side and denied on the other. The object of evidence is to throw light on the facts in issue, that is, to prove or disprove the fact or facts at issue; and any evidence which fairly and legitimately tends to prove or disprove such allegations is relevant to the issue.

The rule that only evidence material to the issue can be admitted is well settled, but the application of the rule, and the determination of what is relevant and what is not creates many nice questions and involves many technical distinctions which are only to be obtained from a careful study of the cases.

If the evidence constitutes a link in the chain of proof it may be relevant. Thus, indirect or circumstantial evidence, by which is meant the proof of some other fact or facts from which, taken either singly or collectively, the existence of the particular fact in question may be inferred as a necessary or probable consequence, may be relevant.

Sec. 1884. WHEN EVIDENCE WILL BE REJECTED AS IRRELEVANT.—Speaking negatively, evidence may be rejected as being irrelevant for

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very nature of the thing to be proved requires as a fit and appropriate proof in the particular case." The word "competent," therefore, is broad enough to include both primary and relevant evidence; but in actual use it is used synonymous with relevant in many instances. If evidence is irrelevant it is incompetent; if relevant and yet not the best evidence, it is still incompetent; that is, while it may be relevant to prove the contents of an instrument, all evidence in the first instance, is incompetent, except the instrument itself.

two reasons, as follows: 1. That the connection between the fact in issue and the fact or facts offered, is too remote and conjectural. 2. That the evidence offered is excluded by the state of the pleadings.

Sec. 1885. RULES APPLICABLE IN DETERMINING RELEVANT EVIDENCE.—The following general principles may be laid down as helpful in determining as to relevancy:

1. Evidence relevant to the issue cannot be made irrelevant by the admission of counsel.*

2. Irrelevant evidence when received may sometimes afford opposing counsel, on cross-examination, an opportunity to elicit relevant evidence, and though the irrelevant evidence is afterwards struck out, the relevant evidence elicited may remain.**

3. Irrelevant evidence may become relevant by reason of the receipt of other evidence. Thus, where the question is as to the quality of goods sold to a party; it would have to be shown that goods furnished to a third party were of the same quality, before the evidence of such third party would be relevant.***

4. The order in which evidence is to be received is in the discretion of the court, and such discretion is not reviewable unless it is abused.****

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*34 Mich. 41.

**69 Mich. 400.

***106 U. S. 342; 7 Mich. 329; 59 Mich. 300.

****This rule applies to testimony sometimes admitted out of order on the pledge of an attorney that it will be shown to

Sec. 1886. CUMULATIVE EVIDENCE IS RELEVANT.—By cumulative evidence is meant evidence of the same kind, to the same point. Thus, if the admission of a party has already been testified to by one witness, and another witness is called to the same admission, it is cumulative evidence. If, however, evidence of a different kind is offered to prove the same fact, it is not to be called cumulative. Evidence is relevant though it is cumulative, but the court might limit the amount of such evidence. In general, several good witnesses, being as sufficient to prove a fact as a dozen.

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be admissible by future evidence. The doing of this is criticised in some cases, and is not to be allowed in criminal cases. 58 Mich. 48; 57 Mich. 500. When evidence has been thus admitted and the attorney fails to make it admissible by producing the promised evidence, the other party should move to strike out the testimony already given. But, of course, the impression that it has made cannot be effaced, and therefore the inadvisability of admitting it in the first place.

CHAPTER V.

OF THE KIND OF EVIDENCE THAT MAY BE GIVEN OF A FACT.

Sec. 1887. OPINION EVIDENCE.—Under the division or heading, what sort or kind of evidence may be given of a fact we will consider opinion evidence, which may be classed as of two kinds: 1. Opinions from non-experts. 2. Opinions from experts.

As a rule a witness is required to speak only as to facts, and not allowed to give his opinion or his conclusion, but there are certain well settled exceptions to this to be noted.

Sec. 1888. OPINIONS FROM NON-EXPERTS.—The object of evidence is to bring before the court facts to which it can apply legal principles. Therefore, non-professional witnesses are not ordinarily permitted to state inferences or conclusions, or to express their opinions. The difficult question to determine is, when is the testimony the statement of a fact, and when is it the statement of an opinion? Testimony may savor of both fact and opinion, and it may be impracticable to refer it to either separately.

Facts coming under the cognizance of the senses, belong to primary evidence. Now, what is included in the senses? What is seen or heard by the witness

is clearly primary evidence, and perhaps all the evidence recognized by the senses is primary evidence.

But there are certain facts made up of a combination of minute appearances which are very difficult of description. In such a case the witness may state the result of these appearances as they impressed him, and he need not describe the minute appearances which go to make up the fact. Thus sanity, intoxication, state of the health, and the state of the affections, are facts of such a character, that the witness may generally testify in regard to them without giving the minute appearances which go to make up his own judgment in the matter.*

Whenever the condition of things is such that it cannot be reproduced and made palpable in the concrete to the jury, or when the language is not adequate to such realization, then a witness may describe it by

*Railroad Co. v. Schultz, 43 Ohio St. 270. In this case it is stated: "The opinions of non-experts, who state, so far as is practicable, the facts on which the opinions are grounded, will be received on questions of identity as applied to persons, things, animals, or hand-writing; and of the size, color and weight of objects; of time and distances; of the mental state or condition of another; of insanity and intoxication; of the affection of one for another; of the physical condition of another as to health or sickness (in which latter case, however, the opinion of a non-expert will not be heard upon the particular disease or cause thereof); of values; of the soundness of animals; and of all subjects where it is not practicable nor possible to put the jury in the possession of all the primary facts upon which the opinions of the witnesses are grounded."

its effect upon his mind, even though such effect be an opinion.*

In New Hampshire it has been held that witnesses who are non-experts cannot give their opinion on questions of sanity, but they may on the question of intoxication.** But this doctrine is changed now, and there are perhaps but three states, Maine, Massachusetts, and Texas, that do not allow the admission of such testimony.***

The Supreme Court of the United States allows the opinion of a non-professional witness as to the mental condition of a person, in connection with a statement of the facts and circumstances within his personal knowledge, and upon which the opinion is based, and this is the rule in nearly all states.****

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*Elliot on Ev. Secs. 671-5. "In matters more within the common observation and experience of men, non-experts may, in cases where it is not practicable to place before the jury all the primary facts upon which they are founded, state their opinions from such facts, where such opinions involve conclusions material to the subject of inquiry. In such cases the witnesses are required, so far as may be, to state the primary facts which support their opinions. Where it is practical to place palpably before the jury the facts supporting their opinions, the witnesses should be restricted in their testimony to such facts, and the jurors left to form their opinions from these facts, unaided by the mere opinions of the witness."—43 Ohio St. 270. See also, 117 Mass. 122; 78 Mich. 209; 84 Mich. 1; 92 Mich. 610; 30 N. Y. 355; 85 N. Y. 75; 45 N. Y. 49; 113 Ill. 632; 78 Ill. 374; 6 Gray, 444; 27 Conn. 192.

**47 N. H. 120; 49 N. H. 349.

***56 N. H. 227; 137 Mass. 414.

****95 U. S. 232; 111 U. S. 612; 47 Mich. 313; 93 Mich. 234. In New York, the non-expert witness may testify whether

Sec. 1889. CONCLUSIONS REGARDING THE ADMISSION OF NON-EXPERT OPINIONS.—The following general conclusions as to the admission of the opinions of non-expert witnesses are supported by the weight of authority:

1. Witnesses other than experts cannot state a supposed existing fact, whether involving an expression of opinion or not, as to matters which have not come under their own personal observation.

2. As to matters which have come under their own senses, they may state them as facts no matter by what sense they are perceived or recognized.

3. Where a statement of fact is the result of a number of minute appearances or combinations which themselves cannot be described so as to make the jury understand it as the witness saw it, and if the matter is within the comprehension of ordinary men, and does not require any scientific knowledge or experience, he may state the fact, though it seems to involve an opinion.

4. The competency of the evidence is not to be determined by the use of the expressions "in your opinion," or "in your judgment," but is to be determined by the character of the evidence which the question seeks to elicit.

Sec. 1890. OPINIONS FROM EXPERTS.—An

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the particular acts which he saw were rational or irrational, but he cannot embrace the entire case and say whether he believes the testator sane or insane. 25 N. Y. 9; 36 N. Y. 276; 34 N. Y. 190.

expert is a person instructed by a specially acquired knowledge or experience with regard to subjects presumably not within the knowledge of an ordinary man.* But it is not necessary that an expert have any experience, as he may acquire his knowledge from the reading of standard works on the special subject concerning which the testimony is required.** He is not to give opinions on matters of common knowledge.***

An expert in machinery may be allowed to give his opinion as to a machine, though this question is the ultimate and only question to be decided in the case.**** A nautical expert may give his opinion as to the probable danger for a tug-boat to tug a number of boats together at a certain place in a high wind.***** So the opinions of physicians and surgeons as to matters within their profession; attorneys, bankers, and the like, are cases of expert testimony commonly allowed in the trial of cases.******

The competency of the party called to give expert testimony is for the discretion of the trial court, and will not be reviewed unless abused.******* An expert may testify as to his own qualification, and the court may receive evidence aliunde.********

*63 Pa. St. 146; 36 Ia. 462; 118 Mass. 546.
**1. Rogers Expert Testimony.
***8 Allen, 408.
****51 Vt. 209.
*****95 U. S. 297.
******1 Greenleaf Ev. 440-441; 4 Barb. 614.
*******12 Wall. 214; 69 Pa. St. 45.
********29 Mich. 175; 64 N. Y. 589; 15 Wall. 9.

Sec. 1891. EXPERT TESTIMONY MAY BE BASED UPON HYPOTHETICAL QUESTIONS. —Hypothetical questions are sometimes used in order to obtain expert testimony. A hypothetical question is defined to be a question which assumes the existence of certain facts for the purpose of eliciting a professional opinion. The facts assumed, must, of course, be supported by the evidence.*

Professional books, and books of science are admissible in evidence, where a witness claims to quote from them. And such books can be produced in order to show that the book does not substantiate the expert witness.**

*66 Ill. 560; 76 Mich. 265.

**121 Mass. 70; 77 N. C. 55; 30 Wis. 614; 38 Md. 15.

CHAPTER VI.

OF PRIVILEGED COMMUNICATIONS.

Sec. 1892. REASON FOR THE EXCLUSION OF PRIVILEGED COMMUNICATIONS.—Certain kinds of evidence are excluded on the ground of public policy. According to Mr. Best and other writers on evidence, all inadmissible evidence is excluded on the ground of public policy; that is, that all rules of evidence are based upon what is supposed to be the best policy to be pursued in view of the results to be accomplished. In the case of privileged communications, the terms public policy is used in a limited sense, and the rejection of the evidence is because from its reception some collateral evil would ensue to third persons, or to society. There are certain relations in life in which there must always exist the highest degree of confidence, and if information and communications so ascertained in confidence could be inquired into in courts of justice, the confidence reposed in such relations would soon be at an end. As a result of protecting these confidential relations the rule establishing privileged communications has been extended by statute to cover relations not protected at common law.*

*Best on Ev. Elliot on Ev. Sec. 622.

Sec. 1893. PRIVILEGED COMMUNICATIONS CLASSIFIED.—Privileged communications may be classified under four heads as follows: 1. Political. 2. Judicial. 3. Professional. 4. Social.

1. Political matters which are privileged may embrace either: (a) Those which concern the administration of penal justice, or; (b) Those which concern the administration of the government.

(a) Under the first head, as to matters concerning the administration of penal justice, it has been held in England, where a person is being tried for treason, that a person who has been employed by an executive officer of the government to collect information was not allowed to disclose the name of his employer, or any connection then existing between him and the officer. The rule being based upon the general principles of convenience and public justice.* It being said in a Massachusetts case that: "Courts of justice will not compel or allow the discovery of such information, either by a subordinate officer to whom it was given by the informer himself, or any other person, without the permission of the government."** The rule only applies when the government is a party interested, or has been practically affected.

(b) As to matters which concern the administration

*24 How. St. Trials, 808; 1 Phillips Ev. 161-4.

**109 Mass. 478; 15 N. H. 181; 43 Ind. 132; 3 F. & F. 693. The matter is for the court to decide whether the admission of the testimony would be injurious to the administration of justice.

of the government, it is held that all official transactions between the heads of the Departments of State and their subordinate officers, can be kept back and not allowed to be put in evidence. The reason for the rule is that the disclosure of these matters might betray secrets of state policy. Thus the communications passing between the Governor of a State and the military office under his control, can be withheld; so the correspondence between an agent of the government and the Secretary of State, are privileged, and it is generally left with the head of the department or the chief executive officer to decide upon the propriety of withholding these matters.*

Sec. 1894. SAME SUBJECT—2. JUDICIAL EVIDENCE.—Judicial evidence which is privileged includes evidence by judges, grand jurors, petit jurors, and in some cases arbitrators with whom matters have been left for arbitration.

The deliberations of a grand jury are secret and generally cannot be testified to in another hearing. This extends not only to the jurors themselves, but also to the public officer, clerk or stenographer who may have been present at their deliberations. Anything pertaining to their deliberations, all discussions and notes in regard to the matter are privileged. They

*1 Wood (U. S. Cir. Ct.), 234; 92 U. S. 105; 85 Pa. St. 433; 32 N. J. Eq. 111; 1 F. & F. 224; 2 B. & E. 130. Where a document of state is withheld on grounds of public policy, it is held that secondary evidence of its contents cannot be given.

cannot be compelled to say who voted for the indictment, or how the vote stood on the finding of the bill. It has been held, however, that a grand juror may be examined as a witness as to whether twelve of the jurors concurred in the finding of the bill, this number being necessary to the finding of a valid indictment.* In Massachusetts by statute and in some other states independent of statutes, a grand juror may be compelled to testify as to whether a certain person testified before the grand jury.**

The affidavit of a petit juror cannot be read to impeach a verdict. Having once deliberately concurred in a verdict he will not be heard to give evidence impreaching that verdict. Neither can the affidavit of a third person as to the admissions of a juror be read in evidence. Nor will jurors be allowed to say that they misunderstood the instruction of the court; or that they intended to find something different from what they did find. But this rule is confined as to what they did during the deliberation of the jury acting as an organized body.***

A judge or justice of the peace before whom a cause is being tried cannot be called as a witness in the case. In order to have such testimony, if material, the case should have been transferred to some other court or justice.****

*4 Me. 140; 8 Mass. 107; 64 Me. 284.

**54 N. H. 484; 43 Ind. 381; 6 Heisk. (Tenn.) 181.

***55 Me. 503; 56 Mich. 536.

****10 Ohio St. 113; 11 Barb. 510. It seems that in some

Arbitrators are judges of the facts submitted to them, and their doings are privileged. But it might be shown that an arbitrator made a mistake in his award.*

Sec. 1895. SAME SUBJECT—PROFESSIONAL COMMUNICATIONS.—Professional communications include those taking place between attorney and client; physician and patient, and spiritual adviser and layman.

It is a general rule that communications as between attorney and client as to legal matters, are privileged, if made for the purpose of professional advice or assistance.** It is not material to the application of this rule whether the attorney has been paid for his services or not, or has been retained by the party. The disclosures of a client to his attorney are not only protected from being called out in a court of justice but are to be perpetually treated as confidential and not to be disclosed anywhere else. The relation involves the greatest confidence and such disclosures are to be kept with absolute integrity. The interpreters, clerks and stenographers in attendance and hearing disclosures made by a client to his attorney are privileged from testifying as to such matters. But the rule does

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cases a petit juror might be sworn as to what he knows about the case. 34 Mich. 21.

*4 C. & P. 427; L. R. 5 H. L. C. 418.

**39 Me. 428; 110 U. S. 311; 113 Cal. 467; 119 Ill. 543; 157 Mass. 90. This was the rule of the common law, and has been adopted by statute in the various States. 114 Pa. St. 603; 105 Wis. 625.

not apply to casual observers who happen to overhear what is said.*

If third persons are present and hear the communications between attorney and client they may testify to the same. So if all parties to the controversy are present and the matter is talked over with counsel, then the privilege of the rule is waived. The privilege does not extend to a communication to a law student supposed to be an attorney.**

When the attorney is made the confident of both parties, or is the common agent of two or more persons, the communications are privileged so far as strangers are concerned; but as between the parties, under such circumstances, the communications are not privileged. Either party can compel the attorney to testify as to what took place. Papers put by one party in the hands of an attorney are privileged. This privilege is wholly for the benefit of the client, and it follows, that the client may waive the privilege and allow the testimony to be received in evidence. The attorney may be called to testify on other points without there being a waiver as to the special point.*** But if the client goes upon the stand and testifies to a part of the privileged communication, or upon the subject matter of such communications and partly answers them, then the privilege

*29 Ohio St. 542; 28 Conn. 172; 13 Gray, 519; 4 Munf.(Va.) 273; 2 Beav. 173; 22 Vt. 555.

**45 N. Y. 51; 145 N. Y. 1; 1 Cush. 576.

***1 Wharton, Ev. 587, note 3; 116 Mass. 231; 47 Ind. 412; 43 Ind. 112.

is held to be waived as to the whole of the communication.*

The rule operates to prevent the client from being compelled to testify as to such communications unless he wishes to waive the privilege, as otherwise it would be meaningless. The privilege does not extend to protect a communication made for any illegal purpose.**

The seal of secrecy on professional communications is said to be perpetual, unless waived by the client. The rule, however, is meant to protect the living in their business relations, and cannot be invoked when the question arises as to the intention of a deceased person with respect to the disposition of his estate.***

Sec. 1896. SAME SUBJECT—PHYSICIAN AND PATIENT.—The common law did not recognize the relation of physician and patient as within the rule of privileged communications, but quite generally by statute this is the case. The privilege is allowed to be waived where the patient sues the physician for malpractice.**** To make communications between physician and patient privileged, the relation of physician and patient must exist, the physician must be acting in his professional capacity, and must be actually a physician.***** Communications made to an assistant

*106 Mass. 193; 29 Mich. 133; 101 Mass. 193; 36 Mich. 302.
**29 Barb. 627; 63 Barb. 468; 130 Mass. 533.
***Greenleaf on Ev. Sec. 242; 9 Me. 287.
****154 Mo. 112; 10 Ind. App. 5; 148 Ind. 238.
*****154 N. Y. 355; 123 Ind. 384; 45 Hun. 307.

come within the rule, but those made to a drug clerk or dentist do not.*

The rule of exclusion under the statutes extends to information acquired while tending the patient in a professional character and which information was necessary to enable him to prescribe; this includes the patient's symptoms, the condition of his body, and the statements of others who are with him, as well as communications from the lips of the patient.** The death of the patient does not remove the prohibition. And the assignee, or the personal representative of the patient, may claim the privilege.*** The privilege extends to the communications between consulting physicians in the same case.****

Sec. 1897. SAME SUBJECT—SPIRITUAL ADVISERS.—The communications between spiritual adviser and layman were not privileged at common law, but are made so by statute in many states. These statutes make the statements or confessions of the layman and the replies of the priest or spiritual adviser privileged, except where the same would tend to shield crime.***** The privilege may be waived by the person confessing, but the spiritual adviser cannot waive

*66 Mo. 588; 104 Mich. 563.

**77 Ind. 203; 67 N. Y. 185; 110 Ia. 32; 91 Mo. App. 586.

***80 N. Y. 281; 103 N. Y. 576; 111 N. Y. 120; 104 N. Y. 352; 99 N. Y. 56.

****99 Ia. 26; 103 N. Y. 573.

*****13 Wend. 311; 58 Ind. 182.

the privilege, unless called as a witness by the party confessing to testify as to such confession.*

Sec. 1898. SAME SUBJECT—SOCIAL LIFE.—The chief instance of privileged communications affecting social life, are those made between husband and wife. This rule existed at common law, where neither husband or wife could testify against the other; they were not competent witnesses, and the communications were also privileged.**

The rule as to communications between husband and wife being privileged varies in the different jurisdictions, in some only private conversations are considered privileged.*** In others only confidential communications.**** While in others all conversations are treated as privileged.*****

There must be a valid marriage between the parties and the marriage relation must exist at the time of the communications to make them privileged. They continue privileged after the death of one of the parties, and by the weight of authority a decree of divorce does not do away with the privilege as to communications theretofore made.******

If the communications between husband and wife are made in the presence of third persons they are not

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*99 N. Y. 56; Elliot on Ev. Sec. 638.
**175 Mass. 177; 40 Fla. 216; 126 N. Y. 249.
***113 Mass. 157; 110 Mass. 181.
****27 N. J. Eq. 311.
*****25 Ohio St. 500; 12 R. I. 333.
******153 Ill. 585; 108 Mo. 352; 49 N. Y. 510; 119 Ia. 220; 81 Ill. 266; 165 U. S. 342.

privileged, and an eavesdropper or passer by may testify as to what was overheard.* At the common law neither could waive the privilege, but at present some courts hold that the one making the communication may testify to it, while others hold that the waiver must be mutual.**

*147 Ind. 3; 55 Kans. 135; 136 N. Y. 633; 110 Mass. 181; 35 Vt. 378.

**131 U. S. 227; 132 N. Y. 181; 113 Mich. 171.

CHAPTER VII.

MATTERS OF WHICH THE COURT WILL TAKE JUDICIAL NOTICE.

Sec. 1899. MEANING OF JUDICIAL NOTICE.—The facts in the case are the subjects of proof, but if they are such as the court will take judicial notice of, they need not be proved. Judicial notice, therefore, means, that for the purposes of the case the court accepts as true certain notorious facts without requiring proof.* So it is said that judicial notice or knowledge of a fact is simply a rule of evidence which dispenses with the necessity of offering evidence to such fact.** The courts take judicial notice of various matters both of law and fact, and when they are so noticed proof is dispensed with.

Sec. 1900. WHAT WILL BE JUDICIALLY NOTICED.—The following things will be judicially noticed by the courts:

1. Foreign Governments. Every court will take judicial notice of the existence and title of all the sovereign powers of the civilized world. Every court of the United States will also take judicial notice of the flags and seals of all foreign nations or powers. This does not mean that the things of which the court

*Bouvier's Law Dict. "Jud. Notice."
**125 Ala. 149.

will take judicial notice need not be brought to the attention of the court by the counsel before they will be given judicial notice. As the court will take judicial notice of the recognition of a particular sovereignty by the United States, and the flags and seals of the various nations, such seals as symbols when attached to any decree or judgment or public act, is received as true and genuine, as the seal is the highest evidence of the national character of a paper.*

Sec. 1901. SAME SUBJECT—LAWS OF NATIONS AND TREATIES, ETC.—2. The courts will take judicial notice of the laws of nations; the general usages and customs of merchants; treaties made by the United States with foreign governments; the public acts and proclamations of these governments; and the public acts of the United States in carrying these treaties into effect.**

Sec. 1902. SAME SUBJECT—FOREIGN ADMIRALTY COURTS, NOTARIES, ETC.—3. The courts will take judicial notice of foreign admiralty and maritime courts; notaries public; and their respective seals. A notary public is an officer recognized as such for commercial purposes by international law. Thus in the protests of foreign bills of exchange the seals of the notaries are recognized by the courts.

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*L. R. 2 Ch. App. 585; 36 N. Y. 146.

**14 Wall. 171.

Sec. 1903. SAME SUBJECT—CONSTITUTION OF UNITED STATES, PUBLIC STATUTES, ETC.—4. The constitution of the United States, the public statutes, the general laws and customs of the Union, and also of their own particular state or territory, will be taken notice of by the state courts. The states are regarded as foreign to each other so far as these things are concerned.

Sec. 1904. SAME SUBJECT—LAWS OF THE STATES, ETC.—5. The courts of the United States will also take judicial notice of the laws of the several states applicable to the case pending before them. The courts will also take judicial notice of the rivers and lakes of the United States which are navigable, and of the course of inland channels.*

What is said of the United States courts is also true of state courts. The courts of a state will take judicial notice of the accession of the chief executive of the nation; of his power and the genuineness of his signature; of the heads of the departments, and public seals; of the election and resignation of United States officers; and of the appointment of the cabinet officers, foreign ministers, and the like.**

Sec. 1905. SAME SUBJECT—SIGNATURES OF OFFICERS, PROCLAMATIONS, ETC.—6. The courts will take judicial notice of the gen-

*8 How. 384.
**17 How. 30.

uineness of the signatures of the United States officers, but not generally of their deputies. Public proclamations of peace or war made by the federal government will be given judicial notice, but no state will take judicial notice of the proclamations or acts of another state. The national holidays are judicially noticed by the courts.

Sec. 1906. SAME SUBJECT—EXTENT OF BOUNDARIES, POLITICAL DIVISIONS, ETC. —7. Every government will take judicial notice of the territorial extent of its own district, and of the extent of their jurisdiction and sovereignty. And this extends to the minor political divisions of the state or nation, as to their general or relative position, but not as to the precise boundary if it is in flict, unless the boundary is prescribed by statute or the general geographical features of the country. The courts will also notice the principal rivers, cities, and to some extent the distance of foreign cities.*

8. The courts will take judicial notice, of such things as are commonly understood by everyone; all things which happen according to the ordinary course of nature; as, the ordinary limitation of human life; the course of time; movements of the heavenly bodies; and the limitations and changes of the seasons, and their general relation to the maturity of crops.**

*91 U. S. 137.
**103 Mass. 146.

Sec. 1907. SAME SUBJECT—PUBLIC FESTIVALS, COMMON MEANING OF WORDS, ETC.—9. All ordinary public fasts and festivals; coincidence of the days of the weeks with the days of the month; and the meaning of all words in the English language, or ordinary vernacular, will be given judicial notice by the courts. But the courts will not take judicial notice of technical words or slang expressions. Abbreviations in common use and generally understood will be given judicial notice, but not those which are in any way doubtful.*

Sec. 1908. SAME SUBJECT—WEIGHTS, MEASURES, COINS, ETC.—10. The courts will take judicial notice of the weights and measures, and coin, and the general character of the circulating medium, and the public language referring to it; but not of the current values of silver and gold at any particular time, this must be proved. The courts will take judicial notice of matters of public interest affecting the whole people, and matters of public interest affecting the government of a particular state or district.

Courts will also take judicial notice of the usual effect of the passions; as jealousy, avarice, hatred, and revenge, as well as those that tend towards the happiness and preservation of life.** Also of ordinary and well established physical laws. And, generally, of all

*15 Mo. 376; 20 Pick. 206; 50 Md. 376; 26 Minn. 316.
**67 Pa. St. 374.

matters which may be considered as being within the common knowledge and experience of all men.*

Sec. 1909. THE COURT WILL REFER TO PROPER SOURCES OF INFORMATION ON MATTERS OF WHICH IT TAKES JUDICIAL NOTICE.—The court may have resource to the proper sources of information on all points of which it takes judicial notice. And the court may refuse to take judicial notice of a matter until satisfied by evidence produced for that purpose that it is proper for him to do so.** The court may resort to an encyclopedia, or work of history, or science, although these works themselves cannot be produced as evidence. The court may consult newspapers and any reference or authority whereby the information desired may be gained.***

*112 Mass. 187; 34 N. Y. 397; 12 A. & E. 624; 114 U. S. 218; 93 Mich. 41; 80 Mich. 585.

**22 How. 392; 61 Me. 178; 6 Wall. 499; 91 U. S 37.

***109 Mass. 24; 7 Pet. 554.

CHAPTER VIII.

OF WRITTEN EVIDENCE.

Sec. 1910. DIVISIONS OF WRITTEN EVIDENCE.—Written evidence is divided into two general classes:

1. Public writings.
2. Private writings.

Public writings are again subdivided as respects their character into; (a) Judicial; and (b) Non-judicial. As respects their mode of proof, public writings are divided into first, those of record, second, those not of record.

Judicial writings may be divided into the following: 1. Judgments, decrees and verdicts. 2. Depositions, examinations and inquisitions taken in the course of legal proceedings. 3. Writs, warrants, pleadings, bill and answer in equity, and all other documents relating to legal proceedings or incident thereto.

A judgment is the final order, determination, or decree of the court, upon a matter duly submitted to it for its determination.

A decree is generally spoken of as pertaining more particularly to a court of equity; and it is the final order, determination or decision of that court. But the term is often confused with, or used as synonymous with judgment.

No judgment or decree is valid unless the court has jurisdiction. Judicially speaking, a judgment or decree means the formal entry of the same made upon the records of the court.

A verdict is the decision of the jury. A verdict, until the judgment is rendered thereon, stands for nothing. In common law cases the verdict is conclusive of the facts that were before the jury. In some states the court has a right to modify the amount of a verdict.

Sec. 1911. METHOD OF PROVING A JUDGMENT.—A judgment may be proved in the following ways:

1. By the mere production of it, if such production can be secured. It can always be secured, of course, where the suit in which it is sought to be introduced is before the same court which rendered it.

2. By copy. Copies of a record are of three kinds: (a) Exemplifications; (b) Copies made by authorized officers; and (c) Sworn copies.

Exemplifications are of two kinds. (i) Under the great seal. (ii) Under the seal of the particular court. In the United States the great seal is usually kept by the Secretary of State; and in the various States the state seal is also kept by the Secretary of each State.* In England the great seal is kept by the Lord Chancellor.

The statutes of the state usually provide how to prove the records of any court. The Constitution of

*3 Gray, 574.

the United States, Art. IV. Sec. 1, provides that: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." Under this provision, Congress, in 1790 passed an Act that: "The records and judicial proceedings of any of the courts of any state shall be proved or admitted in any other court within the United States; (a) by the attestation of the clerk, and the seal of the court annexed, if there be a seal; (b) together with the certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the certificate is in due form. And the said records and judicial proceedings authenticated as aforesaid, shall have full faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence such records are or shall be taken." By a subsequent act passed in 1804, these provisions were extended to the courts of all the territories subject to the jurisdiction of the United States.

Sec. 1912. SAME SUBJECT—EFFECT OF THE ACT OF CONGRESS ON PROOF OF JUDGMENT.—The effect of the Act of Congress above referred to may be said to be:

1. This method is not exclusive, that is, proof by an attested copy does not exclude any other method of

proof, and the party may adopt any method that is convenient in the proof of a judgment.*

2. It does not extend to a judgment in a criminal case. Thus, it does not operate so as to render a witness incompetent in one state who has been convicted of an infamous crime in another, where such is the effect of a conviction.**

3. The judicial proceedings referred to in these acts are generally understood to be the proceedings of courts of general jurisdiction, such as have a judge, chief magistrate, or chief justice, because there must be a certificate by some one of these officers that the attestation is in due form. There is a diversity of opinion upon this point in the United States. It has been held that the judgment of a justice of the peace does not come within the act of Congress.***

4. The act of Congress applies to proceedings in a court of chancery and of probate, as well as to the courts of common law, and they may be proved in the manner described.****

Sec. 1912a. SAME SUBJECT—MODE OF ATTESTATION.—The judge must certify that the attestation is made in due form; that is, the attestation

*103 Mass. 283.

**17 Mass. 515.

***2 Pick. 448; 6 N. H. 567; 3 Wend. 267. But where the justice of the peace is bound by law to keep a record of his proceedings, it is held that his judgments are within the meaning of the act of Congress; 5 Day, 263; 6 Vt. 580.

****52 Ga. 438.

of the copy must be according to the form used in the state from which the record comes. It must be the certificate of the judge of the court from which the judgment comes that it is in due form, the certificate of the clerk is insufficient.*

It must appear from the certificate of the judge that he is the presiding judge at the time he certifies to the record if there are a number of judges forming the court. If there is but one judge it is held that the certificate need not indicate that he is the presiding judge. The clerk should be the officer in person and not an under-clerk.**

Sec. 1913. SAME SUBJECT—2. COPIES MADE BY AUTHORIZED OFFICERS.—Where the law entrusts a particular officer with the making of copies, it gives credit to them in evidence without further proof, though the mere office copy of a person not so licensed would not be admissible. The matter is largely statutory.

Sec. 1914. SAME SUBJECT—3. SWORN COPIES.—Records may always be proven by sworn copies. It must appear, of course, that the original record was taken from the proper custody. The witness may have compared the copy with the original, or he may have been assisted by the clerk, or some other person, in whose custody the record is kept, in comparing them. It must be shown by outside proof that the record from which the copy was taken, was

*36 Ind. 116; 71 Pa. St. 240.
**8 Ga. 201; 24 N. Y. 394.

in the proper custody; and this cannot be shown by the record itself. There is no presumption in favor of the proper custody, it is a fact to be proved.

Every entry in the record is the statement of the act of the court, and must be presumed to have been made by the direction of the court, either by a particular order for that entry, or by a general order, or by a general and recognized usage and practice which pre-supposes such an order.*

Sec. 1915. PROOF OF A DECREE IN CHANCERY.—A decree in chancery may be proved in the same way as a judgment at common law. A decree in chancery should be accompanied by the proof of the bill and answer in order to be proved. The reason for this is that it is necessary to have the bill and answer to find out the force and effect of the decree. If these are set forth in the decree it is sufficient without duplicating them.**

Sec. 1916. PROOF OF JUDGMENTS OF INFERIOR COURTS.—Judgments of inferior courts are generally proved by producing the book containing the proceedings. If they are not in any book, they can be proved by showing the certificate of the magistrate.

Sec. 1917. PROOF OF FOREIGN JUDGMENTS.—Foreign judgments are proved in the same way as other judgments. There is this difference, however,

*4 Met. 421; 2 Cush. 115; 3 Gray, 574; 4 Foster, 344.
**1 Greenleaf on Ev. 511.

in proving a foreign judgment you must prove the jurisdiction of the court, as nothing is presumed in that regard.*

Sec. 1918. WHERE A FORMER JUDGMENT IS SET UP AS A BAR TO FURTHER PROCEEDINGS WHAT MUST BE SHOWN.—Where a judgment is set up as a bar to further proceedings, it is necessary to show:

1. The identity of the parties; this does not mean that the parties in the two suits are the same identical persons. One who is in privity with another is in the same situation as the latter, so far as any verdict or judgment is concerned, whether he claims by privity of blood, estate or in law. Privity denotes mutual and successive relationship to the same rights of property. A judgment against an ancestor binds the heir; a judgment against the representative binds the estate. Where the rights of the parties are dependent upon those of the parties to the judgment, the record of the judgment is evidence; and such dependence may be shown by parol evidence.**

2. There must be proof of the identity of the matter litigated. The cause of action is said to be the same when the same evidence will support both actions, although the form of the action is not the same in the one case as in the other.

3. The judgment offered in bar must be directly

*2 Cranch, 228; 6 Foster, 162.
**23 Conn. 388; 39 Me. 326; 14 Md. 86.

upon the precise point. The judgment will not be in bar of any matter which came collaterally in question, nor of any matter incidentally cognizant, nor of any matter to be inferred by argument from the judgment as having been included therein. Parol evidence may be admissible to show that the precise point was involved.*

4. The former judgment must have been final and conclusive, otherwise it would have no weight in any other court.

5. The judgment must have been upon the merits. Thus, if the judgment has been upon a defect in the pleadings, or anything else than the merits of the case, the judgment is not a bar to the other action.**

6. The operation of the judgment must be mutual. There is an exception to this rule as to cases *in rem,* or against things rather than persons. In such cases a judgment may be evidence against a party while not a party to the former suit. Thus judgments of condemnation of property, decisions of other courts as to the status of parties in marriage, divorce, and the like are received.***

Sec. 1919. PROOF OF OTHER PAPERS OR DOCUMENTS.—In general other judicial writings and papers may be proved in the same manner as judgments.

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*Starkie Ev. 337; 4 Cow. 559; 15 Ill. 453; 2 Ala. 504.

**16 How. 354; 57 Cal. 257. A decree in equity may be shown as bearing upon the same subject though the parties are not the same. 3 Gray, 67; 9 A. & E. 62.

***1 Greenleaf on Ev. 532 note,

Sec. 1920. OF SECONDARY EVIDENCE TO PROVE THE CONTENTS OF WRITINGS.—Written evidence is the best or primary evidence of all facts contained in the writing or document. And the rule of evidence as to the best evidence requires that it be produced. Where such evidence is lost or destroyed, or for some other good reason cannot be produced, the necessity of the case requires that some other kind of evidence be admitted to supply its place. This evidence is known as *secondary* evidence, and can only be used when the primary evidence for some reason or other cannot be produced. The object of secondary evidence is not to put before the court the facts in the case, but it is to put before the court the primary evidence of the facts. Its purpose is to approximate the primary evidence of the facts as nearly as possible under the circumstances, by reproducing the instrument itself.

Sec. 1021. SAME SUBJECT—"LAYING A FOUNDATION."—There must be certain reasons given and certain things done in order to bring in secondary evidence; this is called "laying a foundation" for the introduction of secondary evidence. Under this head the following things are required:

1. Proof of the existence of the writing. This is a pre-requisite, since if it did not exist at one time there is nothing to prove.

2. A bona fide, diligent search for the writing, in places where it would be likely to be found if it did exist.

3. An unsuccessful search. This gives rise to the question as to what is sufficient evidence of the loss of the instrument to admit secondary evidence. It is necessary to satisfy the court that the primary evidence is lost, or cannot be found in order to secure the admission of the secondary evidence, and to do this all the sources of information and means of discovery must be exhausted. But this rule is relaxed to some extent in certain cases.*

As the law does not require the impossible, and is not unreasonable, there are other cases than where the instrument is lost or destroyed when secondary evidence may be introduced. Thus: Where a party has been deprived of the instrument by fraud, he may introduce secondary evidence. And where the nominal plaintiff is adversely interested to the real plaintiff, and it is shown that he had burned the instrument.** For it must appear that the party who has custody of the instrument and who seeks to prove it has not wilfully destroyed the same so as to put in secondary evidence.***

If it is shown that the instrument was in the hands of a third person, the person who has made the search shall be called to testify as to the search.****

Sec. 1922. SECURING A WRITTEN INSTRUMENT IN EVIDENCE.—The method of bringing

*32 Ala. 719; 7 Wheat. 132; 7 Met. 531; 16 N. H. 261.
**3 Watts & Serg. 45.
***45 Me. 331.
****10 Ired. Eq. 274; 7 Q. B. 642.

any instrument into court is precisely as bringing a witness into court. A subpoena issues to any person having its custody to appear and testify, and a *subpoena duces tecum* will issue to the person to bring the instrument desired which is described in the subpoena. This subpoena requires the party to bring the instrument, and a refusal so to do is a contempt of court.*

The court generally inspects the instrument before it is allowed to be put in evidence, and decides in his discretion whether or not the instrument will be produced in public. Where a written instrument is made out in duplicate or triplicate, either one of the parts is admissible in evidence. They all stand on the same footing, and each one is to be received as primary evidence.**

Sec. 1923. THE PROCESS OF PROVING A WRITTEN INSTRUMENT.—There being no degrees of secondary evidence, a lost instrument may be proved by letter press-copy, or a typewritten or carbon copy, or by the memory of a witness who has seen the instrument and knows the contents. No particular method is required.

If it is desired to get a written instrument that is in the hands of the other party, by statute, or the rules of practice it is provided that the party may serve notice on the opposite party to produce the instrument or furnish a copy thereof to him, and if this is not

*10 Pick. 14.
**3 Q. B. 62.

done the instrument may be proved by secondary evidence. Before secondary evidence is admissible in such cases the party must show: 1. The existence of the paper. 2. The custody of the other party. 3. The notice to the other party to produce. 4. That the notice was given at such a time as to allow a reasonable time to produce the paper.*

In the United States courts there is a statute regulating the production of books and papers. The party must show the nature and contents of the paper desired, and the materiality of the paper to the issue.**

The production of papers is usually regulated by statute or rules of practice, but where this is not the case the common law provides for the court issuing an order to the party having possession of the instrument to produce it, where a notice to produce has not been complied with.***

When such an instrument is produced and is found adverse to the party asking for it, the other party has a right to have it put in evidence.****

Where the contract or writing offered in evidence seems to be altered, unless something suspicious appears in the alteration, the instrument will be admitted

*Rev. Stat. Ohio, Sec. 5292, provides how copies of written instruments may be obtained.

**1 Curtis (Cir. Ct.), 401; 1 Wash. 298; 3 Wash. 381.

***3 Cow. 18; 8 C. B. (N. S.) 617; 10 C. B. (N. S.) 148.

****7 C. & P. 386; 1 Allen, 53; 12 Cush. 481; 114 Mass. 77; 33 Me. 360. Contra, 45 N. H. 115.

on the presumption that the alteration was made before the instrument was completed.*

Sec. 1924. THE USE OF SUBSCRIBING WITNESSES IN PROVING WRITINGS.—It is not always necessary to produce subscribing witnesses, but in the case of some instruments, as deeds, it is necessary, if it can be done. It is only necessary to call one subscribing witness, though there has been more than one to the instrument.** But the statutes sometimes require that all the subscribing witnesses to a will be called.

In the following cases the subscribing witnesses or witness need not be called:

1. Where the instrument is over thirty years of age, it is said to prove itself.***

2. Where the instrument is produced by the adverse party upon notice, and the adverse party claims an interest under it.

3. Where the subscribing witness cannot be produced by reason of legal or physical obstacles.

4. Where the adverse party admits the signatures upon the trial.

5. Where the instruments consist of bonds of officers that are required by law to be taken in the name of some public functionary, as a guardian's or administrator's bond.

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*10 Wall. 31; 33 Mich. 302; 1 Greenleaf on Ev. 564, et seq.; 1 Wharton Ev. 631-635; 119 Mass. 270.

**40 N. H. 139; 125 Mass. 446.

***62 Me. 414; 41 Tex. 423.

6. Where the instrument is not directly in issue, but comes incidentally in question in the course of the trial. In all of these cases you may prove the instrument by some evidence other than the subscribing witness.*

Sec. 1925. WHEN THE SUBSCRIBING WITNESS CANNOT BE CALLED IT IS SUFFICIENT TO PROVE THE HANDWRITING ON THE INSTRUMENT.—When the subscribing witnesses are dead, out of the jurisdiction, insane, or otherwise incapable of being called, the execution of the instrument may be shown by proving the handwriting on the instrument. By some authorities it is sufficient to prove the handwriting of the person who executed the instrument.** By others it is necessary to prove the handwriting of one of the subscribing witnesses. It seems to be unnecessary to prove both the handwriting of the witness and the party executing the instrument.

Sec. 1926. PROVING HANDWRITING.—The handwriting of the witness or the party executing an instrument may be shown in the following ways:

1. By any person who has seen the individual write.
2. Where, although he has not seen him write, he

*1 Greenleaf on Ev. 573; 9 Gray, 121; 126 Mass. 132.

**65 Me. 273; 13 Wend. 178; 22 Pick. 90; 6 N. H. 561. Where the subscribing witness has made his mark, it is held that the authority of the mark may be shown, or the execution of the instrument. 7 Ga. 355.

has seen his writing, which has been recognized by the individual as his own.

3. A party may testify as to his own signature.

4. A party's signature may be shown by his admission.

5. It may be proved by comparison.

If a party has seen another write but once, and is otherwise competent to testify, he may testify as to the signature. The fact that he has only seen the party write once, goes to his competency to testify and not to his credibility.*

The proving of handwriting by comparison, by experts, is the most important of the methods of proving handwriting. One of the difficulties in this matter, is the lack of uniformity in the decision as to the standard of comparison to be used. It was formerly the rule that some paper introduced in evidence in the case had to be used as the standard of comparison.** The later rule that generally prevails is that any letter or paper received from the party himself, or that any other party has received from him, may be used to compare with the handwriting in question.*** And the

*25 N. H. 87; 35 Me. 78; 22 Gratt. 405; 20 Ga. 681; 10 Cush. 453; 47 Cal. 294; 2 Ga. 400.

**14 Mich. 286.

***39 Mich. 90; 91 U. S. 270; 46 Ind. 38; 48 N. Y. 458. This is also the English rule—by statute. The comparison may be made by the witnesses or by the jury without the intervention of witnesses. And the paper used for comparison may be put in evidence though not relevant for any other purpose. 1 F. & F. 270; 4 F. & F. 490. See also, 30 Ohio St. 600; 21 Pick. 315; 53 N. H. 452; 39 Vt. 225.

party whose handwriting is in question could be asked to write his signature for the purpose of comparing it with the paper in question.*

The comparison of handwriting as a method of proof can only be made in civil cases, in the absence of statutes extending it to criminal cases, which has been done in some states.**

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*10 Moore, P. C. 530; 45 Me. 534; 110 Mass. 155.

**118 Mass. 420; 14 Ia. 133; 1 Denio, 343. In Pennsylvania a recovery cannot be had upon a note by comparison of handwriting alone, some other evidence must be produced. And the comparison must be made by the jury, and not by experts. 57 Pa. St. 43. In many of the States the comparison is made by experts, but the papers are also submitted to the jury. 42 Mich. 476; 1 Greenleaf Ev. 578. Photographic copies of handwriting are inadmissible as evidence if the originals can be had; and such copies cannot be used for the purpose of comparison. 52 Mich. 214. This case also holds that a paper shown a witness to identify his signature must be shown to him as an entirety. See also, 82 N. Y. 50.

CHAPTER IX.

OF PAROL EVIDENCE TO EFFECT THAT WHICH IS IN WRITING.

Sec. 1927. IT IS A GENERAL RULE THAT PAROL OR ORAL EVIDENCE IS INADMISSIBLE TO CONTRADICT OR VARY THE TERMS OF A WRITTEN INSTRUMENT.—It is a general rule, with certain exceptions or limitations, that parol, contemporaneous evidence is not admissible to contradict or vary the terms of a valid written instrument of a solemn and conclusive nature. This rule applies to all contracts, whether under seal or not.* The rule is applicable to the language only; the contract is still open to consideration to ascertain the intention of the parties or the construction of the terms used.

While the intention of a party is to be gathered from the language used, and the law regards what he says as what he intends, yet the whole of the language used must be construed together in determining what construction shall be put upon it in determining the meaning intended by the parties. So that if a word is ambiguous in one place, it must be compared with the same word as used in another place.

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*Stephen's Digest of Ev. Art. 90; 131 Mass. 110; 141 Ill. 565; 128 U. S. 474; 153 Ind. 322; 73 Wis. 243.

Sec. 1928. HOW LANGUAGE USED IN AN INSTRUMENT IS TO BE UNDERSTOOD.—The language used in a written instrument and the terms therein contained are to be understood in their plain, ordinary and popular sense, unless: 1. The terms or language used have generally, in respect to the subject matter, as by the usage of trade or otherwise, acquired a peculiar or different meaning, distinct from the popular sense of the same word. 2. Or unless the contract evidently points out that in the particular instance, and in order to effectuate the immediate intention of the parties, that it should be used in some other and peculiar sense. But unless the context shows that the words are used in a technical or peculiar sense, the ordinary meaning will be given them.*

Where the instrument consists of a printed blank which has been filled in by writing in the blank places, greater weight is given to the written words than to the words that are printed.**

Sec. 1929. EXCEPTIONS AND LIMITATIONS TO THE RULE EXCLUDING PAROL EVIDENCE.—Notwithstanding the rule that parol evidence is not admissible to alter or vary the terms of a written contract, the following things may be shown though a written contract is declared to exist:

1. It may be shown by parol evidence that there is no written contract, though one is claimed to exist

*L. R. 16 Ch. Div. 718; 6 H. L. Cas. 108; 9 C. & F. 525.
**14 M. & W. 599; 129 Mass. 322.

by the opposite party. Thus one party may claim that the written contract has been lost, and the other that there never was one, the matter is then one of proof.

2. It may be shown by parol that the contract was prepared and written, but that it was never delivered, and never went into force or effect.

3. It may be shown by parol that though the contract was written and delivered, it was only to operate upon a certain condition precedent, and that such condition was never performed, so that the contract never really became operative.

4. So it may be shown by parol evidence: (a) That the instrument was procured by fraud. (b) That the agreement was made for the furtherance of a business forbidden by law and is therefore illegal. (c) That it was obtained by duress. (d) That the party was an infant or minor, and therefore incapable of binding himself. (e) That the party could not read, and that the contract was not binding for want of having been read to him. (f) Or, in fact, anything that goes to show that the particular instrument, by reason of any illegality, never became a binding valid contract.*

*It is said that the parol evidence rule applies only—between the parties; to exclude parol evidence; when the effect is to vary, contradict, or control; when the purport of the instrument has been ascertained; and provided it affirmatively appears that the parties have intended to have the instrument embody their agreement and understanding. Taylor's Ev. (Chamberlayne's Ed.) 808 n. See also, 13 Wall. 202; 85 Pa. St. 369; 10 Allen, 104; 47 Cal. 171; 130 Mass. 259; 132 Mass.

The rule against the admissibility of parol evidence does not exclude parol evidence to show that the date of the instrument is wrong.* Or to prevent parol evidence to show which of two writings is the true one adopted by the parties.** The rule applies only to the parties, and third persons are not affected by it, and may introduce parol evidence to vary the terms of the instrument.***

So the testimony of experts may be admitted to decipher the writing; technical and local meaning of words may be explained by parol; and experts may assist the court in reading the instrument, under the rule.****

Parol evidence may be offered of the existing facts at the time of making the instrument, not for the jury, but for the court to properly understand the application of the contract from the circumstances and surroundings of the parties. And by some courts the

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136. So parol evidence may be given to show that an instrument which is an absolute conveyance upon its face is but a mortgage. 76 Pa. St. 441; 98 U. S. 514; 57 Ill. 195; 109 Mass. 130.

*130 Mass. 355; 59 Pa. St. 398; 32 Md. 196.

**76 N. Y. 32.

***55 N. Y. 222; 23 N. H. 555; 60 Me. 465.

****Thus, the following expressions have been allowed to be explained by parol testimony: "Regular terms of loading," 14 C. B. 38; "Payable in trade," 113 Mass. 34; "Dollars, or current funds," 8 Wall. 1; "Spitting of blood," in insurance policies cases, 6 Me. 63; "All faults," 118 Mass. 242; "The best oil," 19 Wall. 548. But parol evidence is not admissible to vary the meaning of an ordinary and common word. 75 N. Y. 579; 2 R. I. 319; 30 Ia. 205; 35 Mich. 464.

expressions of the parties at the time which are explanatory and not contradictory of the language used in the contract may be admitted.*

So the proof of usage by parol is not in conflict with the rule, but to admit proof of usage it must be shown to be general.** And the subject matter of the instrument may always be identified by parol, and its nature and qualities ascertained in the same way.***

Sec. 1930. CONTEMPORANEOUS WRITINGS RELATING TO THE SAME MATTER ARE ADMISSIBLE.—Contemporaneous writings relating to the same matter as the written instrument are admissible. So also, it may be shown that the instrument or contract is incomplete, and then parol evidence is admissible to show the full extent of the contract.****

Sec. 1931. PAROL EVIDENCE IS ADMISSIBLE TO REBUT AN EQUITY.—Parol evidence is admissible to rebut an equity, of a presumption resulting from the nature of an act, by showing the intention to have been otherwise. Thus, where two legacies of exactly the same amount are left to one person, the presumption is that they are not to be cumulative, and parol evidence would be admissible to show that they were so intended.*****

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*8 Wall. 1; 5 N. Y. 23; 18 Vt. 127; 7 C. B. (N. S.) 305; 58 Mich. 385; Contra, 40 Vt. 322; 21 N. Y. 397.

**13 Wall. 363; 1 Greenleaf Ev. 293; 44 Pa. St. 392.

***124 Mass. 314.

****57 Me. 368; 36 Md. 154; 37 N. Y. 357; 29 N. J. L. 3 S.

*****1 N. J. Eq. 599.

Sec. 1932. PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN A RECEIPT.—The rule excluding parol evidence does not apply to a receipt. A receipt may be qualified or explained as by showing that there was a mistake in it. So parol evidence is admissible to show a mistake in a bill of parcels, and perhaps to a bill of sale of parcels or personal property.*

Sec. 1933. EVIDENCE BY VIEW OR PERSONAL INSPECTION.—The jury are entitled to look at the parties to the litigation, or the person upon trial, as bearing upon the question of age, identity, or personal strength, and the like. So proof by inspection is received in many cases in preference to any description that can be given by a witness, and even a photograph or picture, when material may be offered in evidence to show what the exact condition or appearance is.

A jury may also be taken to view the place where the subject matter of the suit took place, or the property which is the subject of litigation, as in condemnation proceedings. The court must be satisfied from other evidence that the conditions of the place are the same, or practically the same, as when the matter in controversy arose, and that no improper advantage will result from the same. While making such an inspection of the place or property, the jury are not allowed to converse with others in regard to the situation.**

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*9 Conn. 406; 7 Mass. 297; 73 N. Y. 351; 51 Ill. 482; 11 Mich. 186.

**45 N. H. 148; 19 Minn. 271; 44 La. Ann. 46.

So in cases of personal injuries, the courts allow an examination of the injured person for the purpose of ascertaining the extent of the injury. In such a case the attending surgeon is allowed to show the jury in regard to the injury.* So experiments may be made in the presence of the jury to determine the matter in controversy. This is customarily done in patent-right cases, when the machinery may be shown to the jury and experiments made with regard to its operation.**

*30 N. Y. 370; 66 Me. 13; 71 N. C. 85.
**110 Mass. 110; 120 Mass. 185.

CHAPTER X.

OF WITNESSES AND THE EXAMINATION OF WITNESSES.

Sec. 1934. KINDS OF WITNESSES.—Witnesses are the instruments through whom or by means of which evidence is offered to the officer, magistrate or tribunal considering a question of fact. In its comprehensive sense, the word witness includes all the methods of offering evidence. In this sense witnesses are of three kinds: 1. Witnesses which consist of private or public writings. 2. Witnesses which consist of objects, views or persons, or things offered for inspection. 3. Witnesses who give oral or verbal testimony upon the witness stand. It is only the third class that we are yet to consider.

Sec. 1935. CLASSES OF WITNESSES INCOMPETENT AT COMMON LAW.—At the early common law the evidence of the following persons was rejected: 1. Of parties to the record. 2. Persons whose pecuniary interest is directly involved, or those having an interest in the event of the suit. 3. Persons guilty of an infamous crime. 4. Persons insensible to the obligation of an oath, as infidels and atheists. 5. Persons deficient in understanding.

The third, fourth, and fifth of these classes were absolutely incompetent to give evidence, without any reference to the subject matter. The first and second

classes could not testify in their own behalf, or in behalf of those whose pecuniary interest they favored, but they might be called on the other side. So, husband and wife were prohibited from testifying for or against each other at common law.*

Sec. 1936. COMMON LAW DISABILITIES ABOLISHED BY STATUTE.—In England, and in the various American states, the common law disabilities have been taken away or greatly modified by statute. No person is now disqualified from being a witness except where the common law rules are still maintained, by reason of being a party to the record, or by reason of conviction of crime; nor on account of his opinions on the subject of religion. Husband and wife are permitted to testify within certain limitations, but persons deficient in understanding are, of course, not permitted to testify.

Sec. 1937. MEANING OF A COMPETENT WITNESS.—A competent witness is one who is qualified by the rules of law to give evidence. A witness is always presumed to be competent when called to testify. If it is claimed he is incompetent for any reason, this question must be investigated before he is allowed to testify. It is not a question for the jury, but a fact to be determined by the court, whose decision becomes a part of the record and may be reversed for abuse of discretion in a higher court.**

*33 La. Ann. 159.
**27 Minn. 453; 116 Mass. 98; 129 Mass. 474.

Sec. 1938. OF CHILDREN AS COMPETENT WITNESSES.—There is no precise age within which children are excluded from testifying on the presumption that they have not sufficient intelligence. It follows that every child may be called to the witness stand. At the age of fourteen every person is presumed to have sufficient discretion and intelligence to testify. Under that age there is no presumption, therefore inquiry must be made in each particular case. In ordinary cases the child himself is permitted to state his age. The inquiry may or may not be before the jury. As a result of the inquiry if the court thinks the child is competent to testify he is permitted to do so.*

Sec. 1939. RULES GOVERNING THE EXAMINATION OF WITNESSES.—The examination of witnesses is a matter connected with the eliciting of evidence, and is the method of securing from a living witness what he knows concerning the facts, in accordance with the rules of evidence.

A great deal depends upon the discretion of the counsel as to the manner in which the testimony shall be elicited from the witness, and this varies as widely as the characteristics of the counsel who conduct the examination. But some general principles or rules

*3 C. & P. 598; 26 Wend. 608; 41 Tex. 362. Evidence has been admitted of children under nine years of age, and even under five years of age. See 10 Mass. 255; 31 Me. 341; 44 Mich. 286; 55 Mich. 10.

have developed in a way limiting and qualifying the method of examining witnesses. These are:

1. It is not proper to ask leading questions of your own witness. A leading question is a question asked in such a manner as to indicate to the witness the answer desired. The method of examining a witness is usually for the party whose witness he is to call him; this is called the examination in chief. The witness is then cross-examined by the opposite counsel. He may then be inquired of in re-direct examination as to any new matters referred to in the cross-examination; this may be followed by re-cross-examination, and so on.

The rule against leading questions does not apply to matters which do not materially affect the issue, and such as simply lead up to important matters.

2. A second rule is that undisputed facts may be assumed in the question to be asked. The purpose of this is to allow the witness to come as directly as possible to the point in issue. The witness must be confined in his answers to facts within his own knowledge, except in those cases where he is allowed to give his opinion.

3. A third rule is that argumentative questions are improper. It is said that argumentative interrogation is just as improper as argumentativeness in pleading. A common form of such a question is one which embodies a question of fact, and calls for an answer assuming that fact to be true. This is objectionable except where the fact has been proved in the case. For

example, the witness may be asked, "Do you not recollect that it rained that day very hard, so that the roads were very muddy?" In case the condition of the roads is the point in issue, this question is objectionable as indicating the answer desired. The question should be: "What was the state or character of the weather on that day?" Counsel have a right to examine their witnesses before hand and therefore know what the answer will be.

A question that embodies the material fact but does not suggest the answer is not leading. And it is not a breach of the rules of evidence to put the question in the alternative, unless it suggests the answer.*

Where the witness is apparently unwilling to testify, and his testimony is different from what you have reason to believe it would be, the court will, in some cases permit leading questions to be asked notwithstanding the rule. So where the opposite party is called as a witness he may be asked leading questions, as it is presumed that he will be hostile and unlikely to injure his own case by answering leading questions not in accordance with the facts.** And a witness may be assisted by suggestion from counsel where he has made an omission in his testimony by a want of recollection, where the fact omitted is known to exist, and the witness simply fails to recall it.***

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*23 Pa. St. 440; 29 La. Ann. 717.

**64 Me. 267; 78 Ill. 342; 101 Ill. 428; 1 F. & F. 505.

***76 N. Y. 170; 87 Pa. St. 134; 1 Greenleaf Ev. 435. The right to use leading questions is in the discretion of the trial judge, and will not be reviewed except for an abuse of such

Sec. 1940. WHAT THE WITNESS MAY USE TO REFRESH HIS MEMORY.—The witness is entitled to look at any memorandum or instrument, or book, for the purpose of refreshing his memory, to enable him to testify to facts in connection therewith. This is a rule of common occurrence in practice.*

There is some diversity of opinion as to what sort of a paper may be used by the witness to refresh his memory. All agree that a paper in his own handwriting, made at the time of the occurrence in question, or very soon afterwards, may be used.** The opposing counsel is generally entitled to look at the paper or instrument which the witness is using to refresh his memory.***

It is not essential that the writing be made by the witness himself, nor that it should be an original writing, if after it has been read, the witness is able to speak from the facts.****

Sec. 1941. OF THE CREDIT AND IMPEACHMENT OF WITNESSES.—The rule of evidence is that the party who calls a witness represents him to

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discretion. 20 N. Y. 170; 48 N. H. 491; L. R. 10 Ch. 127. The court may ask leading questions himself when he thinks proper in the interest of justice. 37 N. Y. 192.

*11 Wend. 478.

**49 Cal. 167.

***34 Mich. 369; 1 Greenleaf Ev. 436. But if the witness has refreshed his memory by looking at a writing before testifying he need not produce it in court.

****130 Mass. 64; 41 Wis. 602; 39 Mich. 108; 133 Mass. 352; 11 Allen, 572.

the court and jury as being worthy of credit. From this principle some important results arise. If he does not in the law represent him as a person worthy of credit, he certainly represents him as not wholly unworthy of credit.

As a result of representing the witness called as worthy of credit, it is a rule that one cannot *directly* impeach his own witness. The word "directly" is significant, since while you cannot impeach your own witness directly, you may call other witnesses to testify to the facts, and thereby indirectly impeach the witness whose story does not agree with the others.* Even where the opposite party is called the rule is that he is worthy of such credit that he cannot be directly impeached in the first instance.** But the rule does not extend to such witnesses as the law obligates you to call, as the subscribing witnesses to a deed or will, who may be directly impeached.***

The credit of a witness may be impeached directly or indirectly in several ways. Thus:

1. By exhibiting the improbability of his story upon a proper cross-examination.

2. By disproving the facts stated by him, through the testimony of other witnesses.

3. By proving that he has made statements out of court, or on any former occasion in court, contrary to what he testifies to on the trial.

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*48 Md. 182; 71 N. Y. 137.
**51 Ala. 235.
***32 Me. 579.

4. By general evidence affecting his truth and veracity.

But a party who offers a witness cannot generally show that he has made contradictory statements out of court to those made by him in court.*

Sec. 1942. OF THE PRIVILEGES OF A WITNESS.—It is the privilege of a witness not to answer a question, if his answer will expose him to penal liability, or to a criminal charge, or to any kind of punishment. This protection he may claim at any stage of the inquiry, whether he has already answered the question in part, or not at all. But if a witness voluntarily enters upon a subject with reference to which he might claim the privilege, he cannot afterwards assert the privilege. Thus he cannot testify in regard to a fraud, and then assert the privilege.**

In some jurisdictions it is held that a party to an action is not entitled to the privilege of refusing to testify on the ground that it would tend to incriminate him.***

*97 Mass. 67; 49 Cal. 384; 56 N. Y. 585. In the federal courts and in some States the right to cross-examine a witness is confined to such facts as the witness has testified to in his direct examination. 96 Pa. St. 436; 14 Pet. 448. In some States, and in England, a witness called by one party may be cross-examined on the whole case by the opposing party. 60 Mich. 277.

**2 C. & Ker. 474; 72 N. Y. 571; 43 Md. 490; 72 Me. 531.

***104 Mass. 235. Before the court will grant the privilege it must be able to see from the evidence that the answer to a particular question may criminate the witness.

In impeaching a witness by showing that he has made statements out of court, or on a former occasion in court, contrary to what he testifies on the trial, it is necessary that the impeached witness have his attention called to the time, place and person, to whom he has made such statements contradictory of what he has said under oath. If he then says that he did not make such a statement, you may show by the impeaching witness that he did.*

In impeaching a witness by showing his general credit for truth and veracity, the examination of the impeaching witness must be confined to the general reputation of the witness sought to be impeached. Isolated instances of his conduct will not be permitted to be given in evidence, to show his general reputation.**

The impeaching questions are usually as follows: After showing the opportunity of the witness to be familiar with the facts, as by living in the same neighborhood, he is asked, "Do you know the general reputation of A. B. for truth and veracity in the neighborhood in which he resides?" If the answer is "yes," the next question would be, "Is it good or bad?" It is also permissible in many jurisdictions to ask "From your knowledge of the general reputation of A. B. would you believe him under oath?"***

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*2 Brod. & B. 313.

**85 N. Y. 618; 82 Ill. 570; 23 Minn. 84.

***29 Mich. 173; 32 Mich. 484; 21 Kan. 18; 61 Ala. 19. 3 A. K. Marsh, 262; 1 Hill (S. C.), 251.

CHAPTER XI.

OF PRESUMPTIONS, THE BURDEN OF PROOF AND PROVINCE OF COURT AND JURY.

Sec. 1943. PRESUMPTIONS ARE OF LAW AND FACT.—A presumption of law may be said to be a rule of law that a particular inference shall be drawn from a particular circumstance. A presumption of fact is a rule of law that a fact otherwise doubtful, may be inferred from a fact which is proved. There are also certain mixed presumptions of law and fact of which the court will take notice in instructing the jury.

Starkie's classification of presumptions is as follows:

1. Legal presumptions, made by the law itself.

2. Legal presumptions made by the jury, or presumptions of law and fact.

3. Mere natural presumptions, or presumptions of mere fact.

Presumptions of law are divided into, (a) Conclusive presumptions; (b) Disputable presumptions.

When a presumption is conclusive no evidence can be offered against it. But when it is a disputable presumption, evidence may be offered to overcome it.

As regards presumptions of law and fact, the inference cannot be made by the court, but must be drawn by the jury, and is never conclusive.

Presumptions of fact or mere natural presumptions, have little to do with the rules of evidence. They are the same everywhere, and simply mean the natural conclusion which the ordinary mind draws from the facts submitted.

Presumptions of law are usually founded upon reasons of public policy, and social convenience and safety, and are warranted by the circumstances and conditions in administering justice through the courts. Thus, that everyone is presumed to know the law; an accused person is presumed innocent; the presumption of sanity, and the like are legal presumptions.

When letters are delivered to the postman or put in the postoffice there is a presumption that they will reach their destination in due course. This is perhaps a presumption of fact which is allowed to go to the jury along with the other facts. It is not a conclusive presumption and may be rebutted.*

So where a party to a case suppresses evidence that is supposed to be material and important to the case, or refuses to exhibit books bearing upon the controversy, these acts create a presumption of fact against the party, which the jury are entitled to consider along with the other facts in the case.

The possession of any written document, as a note or a contract, raises a presumption that it has been delivered regularly. An infant under the age of seven years is conclusively presumed to be incapable of committing a felony.

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*105 Mass. 392.

Continuous absence for seven years, during which time nothing has been heard from a person by those who would be expected to hear, raises a presumption of death. But this is a disputable presumption, and may be overcome by proof.

There is no presumption as to survivorship between persons of different ages, or sexes who perish in the same catastrophe, as will enable a court to give judgment based upon such differences. If two persons, one of whom is stronger and more vigorous than the other are lost, as at sea, it is said that it becomes a fact for the jury to determine whether the one more able to struggle would survive the other.*

Sec. 1944. MEANING OF BURDEN OF PROOF.—The words "burden of proof" are sometimes used erroneously to signify the burden of introducing evidence. It may be defined to be the burden placed upon the plaintiff of establishing every point essential to maintain his cause of action; and on the part of the defendant of every point essential to maintain his defence.

Sec. 1945. RULES IN REGARD TO THE BURDEN OF PROOF.—The following propositions may be stated as bearing upon the question of the burden of proof:

1. A "prima facie" case relates to one side of the

*Wharton Ev. Sec. 1282; 2 Wood (C. C.), 473; Best on Evidence, 410.

case only, and can in no way affect the burden of proof, as relates to the whole evidence.

2. The burden of proof is declared after all competent evidence is offered and received.

3. Presumptions do not determine the locality of the burden of proof.

4. Generally, whatever goes to attack the plaintiff's case on those points which it is necessary for him to establish, does not operate to change the burden of proof. An exception to this rule is made in the case of fraud, where by the weight of authority, if the plaintiff allege fraud, the burden of proof is upon the defendant to show the absence of fraud.

5. Whenever the defendant offers an independent defence, substantially confessing the plaintiff's case, but avoiding it, the burden of proof is on the defendant.

6. Whenever a right has been once established by some legal proceeding, he who attacks that right has the burden of proof, whether he stand in the attitude to the issue as defendant or plaintiff.

Sec. 1946. DOES THE BURDEN OF PROOF SHIFT?—Many authors and judges affirm that the burden of proof may shift during the progress of the trial from one side to the other. Properly and logically speaking, the burden of proof never shifts, though the issues in the case may so shape themselves that the burden on the plaintiff or defendant is raised by legal presumptions in his favor; or, one party having acknowledged the right of the other, by setting up other

facts endeavors to avoid it, in which case the burden of proof is on him to maintain his issue.*

Sec. 1947. BURDEN OF PROOF ON THE CONTEST OF A WILL.—Where a suit is brought to contest a will, by the weight of authority, the contestant has the burden of proving the undue influence which he claims notwithstanding the fact that the will to be valid, must have been made by a competent testator; of his own free will, and without any undue influence.**

Sec. 1948. PROVINCE OF COURT AND JURY ARE DISTINCT.—The province of the court and jury are distinct under the scheme of the common law. Each has its own peculiar function to perform, and the court will not transgress upon the province of the jury. In all jurisdictions, where there is any evidence upon controverted questions of fact, it would be error

*64 Mich. 59; 99 Mass. 263; 62 N. Y. 448. In the last case where an action was brought by a principal against his agent, the court said: "Upon this question the plaintiff held the affirmative throughout the trial and their relation to the question never changed. During the progress of a trial it often happens that a party gives evidence sufficient to establish his case prima facie, and it is sometimes said that the burden of proof shifts; all that is meant by this is that burden remains on the party throughout the trial." See also, 46 N. Y. 271; 125 N. Y. 172; 100 Mass. 443.

**97 Mass. 79; 34 N. Y. 559; 53 Mich. 112. In criminal cases, the moment any evidence is introduced against the sanity of the accused, the presumption of sanity disappears and the burden of proof is on the State or commonwealth to show the commission of the crime, and also that the defendant had the mental capacity to commit the crime. 17 Mich. 8.

for the court to withdraw such questions from the jury; the ultimate decision of all disputed questions of fact must be left to the jury, except where by agreement of the parties, issues of law and fact are left to the decision of the court.*

Sec. 1949. CREDIBILITY AND WEIGHT OF EVIDENCE FOR THE JURY, COMPETENCY AND ADMISSIBILITY FOR THE COURT.—The credibility and weight of evidence are for the jury, where a jury trial is had; while the competency and admissibility of the evidence are questions for the court. It is also a question for the court as to whether or not there is any evidence upon the issue or issues in the case.**

*114 Pa. St. 367; 142 U. S. 148; 109 N. Y. 621.

**42 Ill. 514; 31 Ala. 59; 107 Ind. 75; 175 Mass. 335; 11 How. 362.

QUESTIONS FOR STUDENTS

The questions are numbered to correspond with the sections in this book. The answers and references for further study may be obtained by referring to the corresponding sections.

CRIMINAL LAW AND CRIMINAL PROCEDURE.

Chapter I.

1678. What are the general divisions of the subject of Criminal Law? What classification is made of the general principles of criminal law?

1679. Define and explain the meaning of a crime.

1680. How is a crime to be distinguished from a tort?

1681. May a civil and criminal suit for the same matter be maintained at the same time? Explain fully.

1682. What may be said as to crime being founded upon an overt act?

1683. Must the overt act and criminal intent concur in point of time?

1684. When may an attempt to commit a crime be punished as a crime? Give the American rule when the attempt could not have been successful in any event.

1685. When is solicitation to commit a crime a criminal attempt?

1686. Are there any crimes except those declared to be such by law? Why? Is there any unwritten criminal law in the United States?

1687. Name some of the chief authorities on criminal law.

Chapter II.

1688. What is meant by conditions of criminality? Name the leading conditions of criminality.

1689. What are the rules governing infancy as a defense to the commission of crime?

1690. What may be said as to compulsion as a defense?

1691. What may be said as to insanity as a defense? Discuss fully.

1692. Discuss partial insanity in its various forms as a defense to crime.

1731. Discuss the kinds of property that are subject to larceny.

1732. What may be said as to the offense of receiving stolen goods?

1733. Name and explain the essential elements to constitute the crime of receiving stolen goods.

1734. Define and explain the crime of embezzlement.

1735. Discuss the essentials to the crime of embezzlement.

1736. What may be said as to the offense of obtaining money or property under false pretenses?

1737. Discuss the ingredients of false pretenses at common law.

1738. Define forgery.

1739. Name and discuss the essentials in the crime of forgery.

1740. Discuss the offense of uttering false paper.

1741. When is the offence of uttering false paper complete?

1742. Define and explain the crime of counterfeiting.

1743. What is meant by malicious mischief? When is the crime complete?

1744. Define perjury? What sort of a crime is it?

1745. Name and discuss the ingredients of the crime of perjury.

1746. In what does subornation to perjury consist? What are the essentials of the crime?

1747. Define and discuss the crime of bribery, at common law and under the statutes.

1748. What was meant by embracery at the common law?

1749. Define and discuss the crime of compounding a felony. What offenses does the common law allow to be compromised by the parties?

1750. Define and discuss the crime of prison breach. Give and explain the elements of this offense.

1751. What is meant by escape? What two kinds of escape at common law?

1752. What is meant by an affray? Can one of the parties be convicted and the other acquitted in an affray? Why?

1753. Explain what is meant by a riot. What is the gist of this offense?

1754. Name and discuss the essential elements in the offense of riot.

1755. Define the crime of conspiracy.

1756. Name and discuss the essential elements in conspiracy.

1757. Define criminal forcible entry and detainer. Was this an offense at the common law? What is the gist of the offense?

1758. Name and discuss the essentials in the offense of criminal forcible entry and detainer.

1759. Define Adultery. To what class of offenses does this belong?

1760. Name and discuss the elements in the crime of adultery.

1761. What may be said as to the rules of evidence in the crime of adultery. What is meant by fornication?

1762. Define bigamy.

1763. Name and discuss the essentials in the crime of bigamy.

Chapter IV.

1764. Name the general rights which the law guarantees to the accused.

1765. Discuss the right of the accused to a trial by jury. What is meant by a jury trial?

1766. Discuss the right of the defendant to defend in person. What other rights in this connection does the accused have?

1767. What may be said as to the right of the accused to be represented at the trial by counsel. What was the limitations on this right at common law? Why?

1768. Discuss the right of the accused to be confronted with the witnesses against him. May the accused waive this right?

1769. What may be said as to the accused not being required to be a witness against himself? What was the rule at common law?

1770. Discuss the right of the accused to have his guilt established beyond a reasonable doubt. What is meant by reasonable doubt?

1771. What is meant by a speedy and fair trial, and how is it guaranteed to the accused?

1772. On whom is the burden of proof in criminal cases? When is evidence of the commission of other crimes admissible against the accused?

1773. What may be said as to the accused being required to identify himself by exhibiting his person. What exceptions

to the general rule in this regard? Discuss the various holdings.

1774. What may be said as to the character of the accused as a defense? What is the presumption in regard to character?

1775. Discuss the use of dying declarations as evidence in criminal cases.

1776. What may be said as to the jurisdiction of the State or nation over crimes? How are the territorial limits of the United States fixed? May a nation punish its citizens for offenses committed in another State or nation? When a crime in an offense against two sovereignties may it be punished by both?

1777. What is meant by the locus of a crime? How is the locus of the commission of a crime established where the injury is received in one State and the death results in another?

Chapter V.

1778. Into what two general classes are actions divided? Is the same system of pleading applicable to criminal and civil pleading?

1779. Explain the necessity of a criminal action. In what great instrument was it first required that crime must be established by "due process of law?" How is this requirement enforced now?

1780. Explain how a criminal action is begun. What power has the court over the bringing of such actions?

1781. Define and explain what is meant by an indictment. What are the essentials of a good indictment? What is a criminal information? What is meant by a complaint? How is the form of an indictment governed? What care should be taken in the drawing up of an indictment? Why?

1782. Name the parts of an indictment. Define and describe each. What is the purpose of the venue? the commencement? Give the form of each.

1783. Explain and discuss how the name and additions of the accused should be set forth in an indictment at common law and at present?

1784. How are the names of persons other than the defendant to be stated in the indictment? What is the rule in regard to names that are "idem sonans?" Give the rules stated by Heard as to stating names.

1785. What are the requirements as to stating time with precision in an indictment? Discuss fully.

1786. What is the necessity in regard to alleging time and place in an indictment? How is this done? What is the rule when the crime is not of a local nature?

1787. What is the effect of "then and there" when used in the subsequent clauses of an indictment? Must time and place be laid according to the truth? What exceptions to the rule?

1788. What is the requirement as to stating the facts with certainty in an indictment? What allegations must the indictment contain? Discuss fully, what should be averred in a good indictment.

1789. What is the meaning of "inducement" in an indictment, and explain how it should be alleged.

1790. Why is argumentativeness a defect in an indictment? How may an allegation be aided by an implication?

1791. Why is an allegation in an indictment charging a party disjunctively void? When the word "or" is used in the sense of "to wit" is its use in the indictment bad?

1792. Does the rule of pleading as to duplicity apply to criminal pleading? How is an objection for duplicity taken?

1793. What is the effect of repugnancy in material parts of the indictment?

1794. What may be said as to surplusage in criminal pleading?

1795. Should conclusions and presumptions of law be stated in an indictment? Why?

1796. How are allegations of intent and knowledge to be made in an indictment? What technical terms must be used?

1797. Must technical terms be used when essential to the description of the offense? When there is an exception in the statute should the indictment show that the defendant is not within this exception? Explain the rule in this regard.

1798. What should be the form of the conclusion of an indictment?

1799. When may a motion to quash the indictment be made?

1800. What is the general order and time of pleading in criminal matters?

1801. What is the nature of a plea of guilty? May such a plea be implied? Explain the effect of an implied plea of guilty.

1802. What is meant by a plea to the jurisdiction? When must it be made?

1803. What is the effect of a plea in abatement? When should it be made?

1804. What is the purpose and object of a demurrer? What is the effect of it when sustained? when overruled?

1805. What sorts of pleas in bar are there? Define and discuss the pleas in bar. What is the effect of a plea in bar being sustained? What is the general plea in bar? What is the burden upon the state when such a plea is made?

1806. What is meant by the verdict? How is it rendered? Explain a general and special verdict.

PART II.

Chapter I. The Law of Evidence.

1807. To what general branch of law does the subject of Evidence belong? What is the general purpose of the law of evidence?

1808. What is necessary to the establishment of facts? What is evidence concerned with?

1809. How are evidentiary facts established? How is the existence of a fact to be ascertained? How have the rules of evidence developed?

1810. Discuss and explain the meaning of a fact.

1811. Define Evidence; Law of evidence.

1812. Give and explain the sources of evidence. Give the principal writers on evidence in their order.

1813. Name the various terms used in describing the kinds of evidence.

1814. Define and explain Demonstrative evidence. Moral evidence.

1815. What is meant by direct evidence?

1816. Explain the meaning of circumstantial evidence.

1817. Explain fully the meaning of the terms primary and secondary evidence.

1818. Explain and distinguish between prima facie and conclusive evidence.

1819. What is meant by competent and incompetent evidence?

1820. What is meant by relevant evidence? Irrelevant evidence?

1821. Explain what is meant by documentary or written evidence.

1822. Explain parol and extrinsic evidence.

1823. What is meant by real evidence?

1824. Explain the meaning of cumulative and corroborative evidence.

1825. What do you understand by satisfactory evidence?

1826. What is meant by "testimony" and "proof?"

Chapter II.

1827. Give the general rule in relation to the best evidence. What is the purpose of this requirement?

1828. Into what divisions is evidence divided as a result of the best evidence rule? What other words are used to designate these divisions?

1829. Explain the meaning of the terms "principal fact" and "evidentiary fact."

1830. Explain and discuss the best evidence rule.

1831. What is meant by hearsay evidence? Illustrate.

1832. What is the general rule as regards the admission of hearsay evidence? Give the reasons for the rule. Does the rule apply when no better evidence of the fact can be found?

1833. What may be said as to the exceptions to the rule excluding hearsay? Name the classes of cases in which the rule is not applicable.

1834. Discuss and explain the rule applicable when the fact in issue is whether or not a statement was made.

1835. What may be said as to the admissibility of general reputation? Is it regarded as hearsay?

1836. What may be said as to the admission of evidence as to market value. What may witnesses testify to in this regard?

1837. Mention other apparent exceptions to the hearsay rule, which are in the nature of original evidence.

1838. When hearsay evidence is admitted without objection what is the fact as to its being considered by the jury?

1839. Explain fully the meaning of the term "res gestae."

1840. Discuss and explain when declarations a part of the res gestae are admissible in evidence.

1841. What is meant by contemporaneous, and the sweep of the res gestae? What is the rule as to the declaration being contemporaneous to be admissible?

1842. What relation to the thing done must the declaration a part of the res gestae have?

1843. What is the ground for the admission of declarations a part of the res gestae?

1844. Explain and discuss the leading cases of, Queen v. Beddingfield; Ohio Railway v. Stanley; Insurance Company v. Mosley; Felton v. Amadon; Railway Co. v. Herrick.

1845. What may be said as to the admissibility of declarations made by agents, co-partners or conspirators?

1846. What may be said of the sweep of the res gestae in cases of rape and bankruptcy?

1847. Name the other classes of cases which are said to fall under the head of declarations a part of the res gestae.

1848. What is the rule as to the admission of declarations affecting boundaries, possession and titles? What is the New York rule? The Massachusetts rule? What points govern the admissibility of such declarations?

1849. What may be said as to the admissibility of declarations made in the course of official duty?

1850. What may be said as to the admissibility of declarations made in the ordinary course of business?

1851. What may be said as to written entries as declarations? What preliminary matters must be shown to make such declarations admissible?

1852. Discuss the admissibility of declarations relating to bodily and mental feelings. What are the grounds for their admission?

1853. Discuss to what extent the witness may interpret declarations of bodily and mental feeling heard by him.

1854. What is the effect of statutes permitting parties to testify upon the admissibility of declarations?

1855. What is meant by "pedigree?" Do such declarations properly belong to hearsay evidence?

1856. What are the qualifications of the declarant to pedigree?

1857. Give the rule as regards the admission of declarations relating to pedigree.

1858. State the grounds upon which declarations as to pedigree are admitted.

1859. What limitations upon the rule admitting declarations concerning pedigree?

1860. Explain what is meant by declarations against interest.

1861. What rules govern the admissibility of declarations against interest? Discuss fully.

1862. Upon what ground or grounds are declarations against interest admitted?

1863. To what extent may collateral matters be included in declarations against interest?

1864. What is meant by dying declarations?

1865. When are dying declarations admissible in evidence?

1866. What are the reasons for the admission of dying declarations?

1867. What do you understand by declarations of public and general interest?

1868. What are the rules governing the admissibility of declarations as to matters of public and general interest?

1869. What are the grounds of admission of declarations of public and general interest?

1870. When may the testimony of a witness given on a former trial be introduced in evidence?

1871. What is meant by ancient documents in evidence?

1872. When will ancient documents be admitted in evidence? On what grounds are they admitted?

1873. What is necessary as to custody in regard to the admission of ancient documents?

Chapter III.

1874. To what class of evidence do admissions belong? Upon what principle are they received in evidence?

1875. Who may make binding admissions? Explain fully. When there are several parties to the record what is the rule as to admissions?

1876. Explain when the admissions of strangers are admissible in evidence?

1877. When are the admissions of the wife binding upon the husband? Of the husband upon the wife?

1878. Explain when the admissions of attorneys are binding?

1879. When may admissions be implied, and be binding upon the party?

1880. Are admissions containing hearsay to be received in evidence? What is the rule in this regard in New York?

1881. What may be said as to the conclusiveness of admissions?

1882. What is the effect of admissions made under duress or for the purpose of compromise?

Chapter IV.

1883. What is the meaning of the term "relevant" as used in the law of evidence? In general what evidence is relevant?

1884. Explain when evidence will be rejected as irrelevant?

1885. State the rules applicable in determining relevant evidence.

1886. Is cumulative evidence relevant?

Chapter V.

1887. Explain what is meant by opinion evidence.

1888. Discuss the admissibility of opinion evidence from non-experts.

1889. State the general conclusions in regard to the admission of non-expert opinions.

1890. What may be said as to the reception of opinions from experts? How is the competency of an expert witness determined?

1891. Explain how expert testimony may be based upon hypothetical questions.

Chapter VI.

1892. State the reason for the exclusion of privileged communications.

1893. How are privileged communications classified?

1894. What is meant by judicial evidence? To what extent is such evidence privileged?

1895. What are professional communications? To what extent are they privileged? What is the rule as to communications made to an attorney? How long does the privilege continue?

1896. To what extent are communications between physician and patient privileged? How long does the privilege continue?

1897. What is the rule as to communications to spiritual advisers being privileged?

1898. What communications in social life are privileged?

Chapter VII.

1899. Explain the meaning of judicial notice.

1900. What is the first class of things that will be judicially noticed?

1901. Explain fully to what extent treaties and the laws of nations will be judicially noticed.

1902. What will be noticed as to Admiralty courts and notaries?

1903. Are public statutes and the constitution judicially noticed?

1904. To what extent will the laws of the States be judicially noticed?

1905. Are official signatures and proclamations judicially noticed?

1906. What will be judicially noticed as to boundaries, political divisions, etc.?

1907. What may be said as to the common meaning of words being noticed by the courts?

1908. What else will the courts take judicial notice of in legal proceedings?

1909. How does the court derive its information on matters of which it takes judicial notice?

Chapter VIII.

1910. What are the divisions of written evidence? How are public writings divided? Define each class.

1911. What is the method or methods of proving a judgment?

1912. What is the effect of the Act of Congress upon the proof of a judgment?

1913. Describe the mode of attestation in the proof of a judgment.

1914. What may be said as to copies made by authorized officers?

1915. Explain what is meant by sworn copies of records?

1916. What is the method of proving a decree in chancery? Should the bill be made part of the record? Why?

1917. How are the judgments of inferior courts proved?

1918. What must be shown when a judgment is set up as a bar to further proceedings?

1919. What may be said as to the proof of papers and documents in general?

1920. What may be said as to the use of secondary evidence to prove the contents of written instruments?

1921. What is meant by laying a foundation? What are the requirements for the introduction of secondary evidence?

1922. How may written instruments be secured for use in evidence?

1923. What is the process of proving a written instrument?

1924. Explain fully the use of subscribing witnesses in the proof of writings.

1925. When the subscribing witness cannot be called how is the instrument proved?

1926. Explain the method of proving handwriting.

Chapter IX.

1927. What is the general rule as to the admission of parol evidence to contradict or vary the terms of a written instrument? How far, and to what is this rule applicable?

1928. Explain the rules governing the construction to be put upon the language in an instrument.

1929. Give and explain the exceptions to the rule excluding parol evidence.

1930. Are contemporaneous writings relating to the same matter admissible? Why?

1931. Is parol evidence to rebut an equity admissible?

1932. May parol evidence be admissible to explain a receipt?

1933. What is meant by evidence by view or personal inspection. When is such evidence admissible?

Chapter X.

1934. Explain the various sorts of witnesses.

1935. What classes of witnesses were incompetent to testify at common law? Why?

1936. Explain which of the common law disabilities of persons to testify have been abolished by statute.

1937. What is the meaning of a competent witness?

1938. Give the rule governing children as witnesses.

1939. What rules govern the examination of witnesses?

1940. Explain what a witness may use to refresh his memory.

1941. Explain the rules governing the credit and impeachment of a witness.

1942. Discuss and explain the privileges of a witness in testifying.

Chapter XI.

1943. What sorts of presumptions are there?

1944. What is the meaning of burden of proof?

1945. Give and discuss the rules governing the burden of proof.

1946. What may be said as to the burden of proof shifting?

1947. What may be said as to the burden of proof on the contest of a will?

1948. What may be said as to the province of the court and jury?

1949. State the province of the court and jury in regard to the evidence produced.

ABBREVIATIONS

(SEE ALSO THE ABBREVIATIONS GIVEN IN PREVIOUS NUMBERS.)

Abb. App. Dec.—Abbott's New York Court of Appeals Decisions.

Archb. Crim. Pl.—Archbold on Criminal Pleading and Evidence.

B. & Ald.—Barnewall & Alderson's Reports, English King's Bench.

Bish. C. L. or Bish. Crim. L.—Bishop on Criminal Law.

Bouv. L. Dict.—Bouvier's Law Dictionary.

Burrill Circ. Ev.—Burrill on Circumstantial Evidence.

C. & K., or Car. & K.—Carrington & Kirwin's Reports, English Nisi Prius.

Cl. & Fl., or Clark & F.—Clark and Finnelley's Reports, English House of Lords.

Cox C. C., or Cox Cr. Cas.—Cox's Criminal Cases, English and Irish Courts.

Crim. L. Mag.—Criminal Law Magazine.

Curtis—Curtis' Reports, United States Circuit Court.

El. & Bl., or El. & B.—Ellis and Blackburn's Reports, English Queen's Bench.

Eng. L. & Eq.—English Law and Equity Reports.

Esp.—Espinasse's Reports, English Nisi Prius Cases.

Ev.—Evidence.

Humph.—Humphrey's Reports, Tennessee Supreme Court.

Hawk. P. C.—Hawkins' Pleas of the Crown.

Heard Cr. Pl.—Heard's Criminal Pleading.

How. St. Tr.—Howell's State Trials.

L. Q. Rev.—Law Quarterly Review.

Leach C. C., or Leach—Leach's Crown Cases, English Courts.

L. R. A.—Lawyer's Reports Annotated.

Mod., or Mod. Rep.—Modern Reports, English Courts.

P. & C., or Prid. & C.—Prideau & Cole's Reports, English Courts.

Q. B. D.—Queen Bench Division.
Ld. Raym., or Raym.—Lord Raymond's Reports, English King's Bench and Common Pleas.
Sec.—Section.
Steph. Com.—Stephen's Commentaries on English Law.
Steph. Dig. Ev.—Stephen's Digest of Evidence.
S. W. Rep.—Southwestern Reporter.
Tit.—Title.
Tenn. Chan., or Tenn. Ch.—Tennessee Chancery Reports.
Upp. Can. Q. B.—Upper Canada, Queen's Bench Reports.
Whart. St. Tr.—Wharton's State Trials of the United States.
Yerg.—Yerger's Reports, Tennessee Supreme Court.

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